(24,490)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 314.

CHENEY BROTHERS COMPANY, LANSTON MONOTYPE MACHINE COMPANY, LOCOMOBILE COMPANY OF AMERICA, ET AL., PLAINTIFFS IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 1, 1915.

a COMMONWEALTH OF MASSACHUSETTS:

I, Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts, do certify that John F. Cronin, Esquire, whose signature is affixed to the paper hereto annexed, is Clerk of said Court, holden at Boston, in and for the County of Suffolk, in said Commonwealth, and hath the keeping of all the ancient files, records, and proceedings of said Court throughout the Commonwealth, down to the first day of August, A. D. 1797, as well as of the files, records, and proceedings of said Court holden as aforesaid, for said County of Suffolk, subsequent to that time; and is, by law, the proper person to make out and to certify copies of all the records and proceedings of the said Supreme Judicial Court previous to the said first day of August, A. D. 1797, as well as of all records and proceedings of the said Court, holden as aforesaid, for the said County of Suffolk, subsequent to that time; and that full faith and credit is and ought to be given to his acts and attestations, done as aforesaid, and that his attestation to the paper hereunto annexed is in due form.

In testimony whereof, I have hereunto set my hand, and caused the seal of said Court to be hereunto affixed, this fifth day of December in the year one thousand nine hundred and fourteen.

[SEAL.] ARTHUR P. RUGG.

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the District Court, Massachusetts.]

The President of the United States to the Honorable the Justices of the Supreme Judicial Court of the Commonwealth of Massachuetts, holden at Boston within and for the County of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the consolidated suit between Cheney Brothers Company, Lanston Monotype Machine Company, Locomobile Company of America, Northwestern Consolidated Milling Company, Copper Range Company, The White Company, Champion Copper Company and Pocahontas Fuel Company, Petitioners, and the Commonwealth of Massachusetts, Respondent, in a plea of Petitions in Equity wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the

construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of all the said petitioners in said consolidated suit (excepting the Pocahontas Fuel Company), as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 30th day of November in the year of our Lord one thousand nine hundred and fourteen.

WILLIAM NELSON,
Clerk of the District Court of the United States,
District of Massachusetts.

Nov. 30, 1914.

Allowed by

ARTHUR P. RUGG,
Chief Justice of the Supreme Judicial
Court of the Commonwealth of Massachusetts.

1½ COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

And now, here, the Judges of the Supreme Judicial Court make return of this writ by annexing hereto and sending herewith, under the seal of the said Supreme Judicial Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In Testimony Whereof, I, John F. Cronin, Clerk of said Supreme Judicial Court, have hereto set my hand and the seal of said Court this fifth day of December, A. D. 1914.

[SEAL.] JOHN F. CRONIN, *Clerk.*

[Endorsed:] 19803, 20519, 18927, 19896, 19897, 19784, 19408, 19906. Eq. Cheney Brothers Company et al. vs. Commonwealth of Massachusetts. Writ of Error. Suffolk, ss: Supreme Judicial Court. Filed Nov. 30, 1914. John F. Cronin, Clerk.

2 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To all persons to whom these presents shall come, Greeting:

Know, ye, That among Our records of Our Supreme Judicial Court, sitting at Boston in the County of Suffolk, for the hearing of cases in equity, from the first day of January in the year of our Lord one thousand nine hundred and thirteen to the fifth day of December, one thousand nine hundred and fourteen, both inclusive, it is thus contained, the following being the entire record in the case:

3 COMMONWEALTH OF MASSACHUSETTS,
Suffolk County:

Supreme Judicial Court. In Equity.

No. 19803. Eq.

CHENEY BROTHERS COMPANY, Petitioner,
v.
COMMONWEALTH OF MASSACHUSETTS, Respondent.

No. 20519. Eq.

LANSTON MONOTYPE MACHINE COMPANY, Petitioner,
v.
SAME, Respondent.

No. 18927. Eq.

LOCOMOBILE COMPANY OF AMERICA, Petitioner,
v.
SAME, Respondent.

No. 19896. Eq.

NORTHWESTERN CONSOLIDATED MILLING COMPANY, Petitioner,
v.
SAME, Respondent.

No. 19897. Eq.

COPPER RANGE COMPANY, Petitioner,
v.
SAME, Respondent.

No. 19784. Eq.

THE WHITE COMPANY, Petitioner,
v.
SAME, Respondent.

No. 19408. Eq.

CHAMPION COPPER COMPANY, Petitioner,
v.
SAME, Respondent.

No. 19906. Eq.

POCAHONTAS FUEL COMPANY, Petitioner,
v.
SAME, Respondent.

4 *Report.*

The above-entitled causes were heard before me as one consolidated cause, upon the amended petitions, the answers, the replications, the facts agreed upon by counsel, and the requests for rulings of law made respectively by the petitioners and by the respondent. I granted all the requests of the respondent, and refused all the requests of the petitioners, and ordered the petitions dismissed.

At the request of the petitioners I report the causes as one consolidated cause for the consideration of the Full Court.

With respect to each of the causes, if all of my rulings applicable to that cause were correct, the petition is to be dismissed with costs; but if any of my rulings applicable to that cause was incorrect, such decree is to be entered as the correct rulings, and whatever rulings should have been made in the place of the incorrect rulings, may require.

JOHN C. CROSBY, *J. S. J. C.*

Order for Consolidation.

The above-entitled causes came on to be heard this day upon motion of the commonwealth to consolidate said causes; and thereupon, upon consideration thereof and with the consent of all parties, it is ordered, adjudged, and decreed that all of the above causes be consolidated and be heard as one consolidated cause.

By the Court,

JOHN H. FLYNN,
Assistant Clerk.

February 27, 1914.

No. 19803. Eq.

Amended Petition.

To the Honorable the Justices of the Supreme Judicial Court sitting in equity within and for the County of Suffolk:

Respectfully represents your petitioner, the Cheney Brothers Company, as follows:

1. Your petitioner is a foreign corporation chartered and incor-

porated under the laws of Connecticut, for the purpose of engaging in interstate commerce throughout the United States, besides other purposes not material herein.

Its total authorized capital stock amounts at par to $1,000,000.

5 It maintains an office or usual place of business chiefly, if not wholly, for the purposes of its interstate commerce at Boston in said county of Suffolk.

The main purpose of its charter and business is trading and selling its products for profit through interstate commerce.

Trading, selling, and commerce constitute the dominant business of the petitioner in this commonwealth.

The activities of the petitioner conducted within this commonwealth are wholly those of commerce, and not of manufacture or production. Whatever manufacturing, mining, or other operations may be conducted elsewhere by the petitioner, its activities in this commonwealth are wholly commercial in character, and consist almost wholly, if not exclusively, of interstate commerce and matters fairly incident thereto.

For the purpose of accomplishing the sale of its products at a profit, the said company is also engaged, but not wholly outside of Massachusetts, in the business of buying, manufacturing, or producing the goods or products to be sold by it.

Its manufacturing or producing business is entirely separable from the commerce which follows and which is involved in the sale of its products.

This commonwealth is concerned only with the trading, selling, and transportation portions of its business, constituting commerce—and, almost exclusively, interstate commerce.

The said company is engaged in the business of selling and delivering its products in interstate commerce throughout the United States, including Massachusetts, where its business is either exclusively or mainly interstate commerce.

Your petitioner duly entered this state for the purpose of transacting interstate commerce, and is now engaged therein, consisting partly of contracts of sale made or accepted and finally entered into elsewhere with residents of this state, and partly of sales of its products requiring or contemplating transportation and delivery of its products from other states into Massachusetts.

That its business within this state consists exclusively, or, in any event, almost wholly, of interstate sales or deliveries, the same constituting interstate commerce and requiring transportation and delivery from other states where the goods sold are manufactured, produced, or stored by your petitioner into the state of Massachusetts, where the purchaser of such goods resides, or through this state into another state different from the state where such transportation or delivery begins.

That if it shall appear that any portion of its business
6 within this state is intrastate commerce, such portion is so insignificant in amount that its intrastate business cannot be regarded as either real or substantial.

Moreover, such portion constitutes a mere incident to its interstate commerce, only 5 per cent or thereabouts of its Massachusetts sales being delivered out of a small stock of goods kept here in the original packages and transported here from another state for purposes of sale in Massachusetts, and deliveries being made occasionally out of this small stock purely for the convenience of its customers.

The busines transacted by your petitioner in Massachusetts is almost wholly interstate commerce.

The office or place of business here maintained by your petitioner is solely for the purpose of transacting, managing, or supervising such business, and thus is maintained almost wholly for the purposes of interstate commerce. The agents and employees there engaged are employed almost wholly for such purposes.

The receipts and profits derived from such Massachusetts business, and the deposits of money representing the same, arise almost wholly from interstate commerce.

At its office or place of business in Massachusetts your petitioner holds no corporate meetings whatever, either of its directors or stockholders. It makes no transfers of capital stock. Its president, treasurer, directors, and executive officers make no use of the same, their office being at the main office of the company outside of this state.

All the products of your petitioner are produced, manufactured, or acquired outside of this state, and all business transacted within this state requires or contemplates transportation and delivery thereof from the state where produced or manufactured into or through Massachusetts to the purchaser thereof residing in Massachusetts or in some state other than the state where the seller, manufacturer, or producer is located, or where the goods are produced.

Your petitioner, pursuant to its usual and regular course of business, transacts no fairly substantial business within the limits of this state outside of its interstate sales and deliveries, constituting interstate commerce, the management, direction, and supervising of its interstate commerce and the collection and deposit of the proceeds thereof, and other matters fairly incident to its interstate business.

Under the usual course of business the company derives no substantial income, profits, or revenue from its Massachusetts business except that derived from its interstate commerce herein.

7 Such local and domestic transactions, if any, as may be transacted within this state are either mere incidents to its interstate commerce, or are exceptional, comparatively trifling in amount, or not transacted pursuant to its regular course of business.

Nor do they contribute in any real or substantial degree, or more than a slight percentage of its entire business, to the revenue or profits of your petitioner derived from its total business within this state.

Such local and domestic business, if any, is interwoven with its interstate commerce, and both its interstate and its domestic business, if any, are transacted by the same instrumentalities and the same agencies carrying on in the same places both kinds of business.

No attempt has been made by your petitioner to separate its in-

terstate commerce from its domestic business, if any, by the limitations of state lines in its prosecution, nor are the same separable.

Nor would it be possible to determine what portions of the company's expenses are chargeable against its domestic business, if any, or what portion of its income or profits are derived therefrom.

The necessary effect of said excise is, accordingly, to burden directly and substantially the company's interstate commerce transacted in Massachusetts and elsewhere, and thus to regulate commerce contrary to the provisions of the federal Constitution.

2. That the commodity or privilege of doing a local business in Massachusetts in conjunction with its interstate commerce is of no substantial value to your petitioner, but is chiefly, if not wholly, for the convenience of its customers.

That the business and financial advantages, and the protection of the laws afforded by the privilege or commodity granted by this state with respect to local business, are trifling, negligible, and of slight value.

The charge or tax imposed for the privilege is grossly excessive.

The charge or tax for such privilege is wholly disproportionate to the amount of local business, a trifling profit, if any, being derived therefrom by your petitioner.

Whatever value there may be to the petitioner in the privilege of keeping a local stock of goods is fully compensated for by local taxation, to which your petitioner is subject upon its stock in trade.

The foreign-corporation tax taxes your petitioner unjustly for the mere privilege of keeping a small stock in trade, for ex-
8 ceptional uses in connection with its interstate trade, which stock has already paid its full taxes once upon its entire value, thereby substantially duplicating the charge for the alleged privilege.

3. The authorized capital stock at its par value constitutes the entire capital of your petitioner, and not merely a portion of its capital, the company having no surplus assets over and above its authorized capital stock at par.

That practically all of the capital, property, and assets of your petitioner are permanently invested and located beyond the limits of this state, excepting, however, a small proportion, not exceeding 5 per cent or thereabouts, which is invested or used in this state mainly for the purpose of transacting its interstate commerce, and which is subject to, and pays, the local property taxes levied and assessed against its property by the city or town in this state where it is located.

4. That under the foreign-corporation laws of Massachusetts contained in sections 56 to 60 and section 75 of chapter 437 of the Acts of 1903, in force at the time when your petitioner began to transact business in Massachusetts, foreign corporations were authorized to maintain an usual place of business in Massachusetts upon performance of certain conditions and payment of certain prescribed fees, and upon paying, and continuing to pay yearly, the foreign-corporation excise, amounting to one hundredth of 1 per cent of the authorized capital stock, as prescribed by said section 75.

That your petitioner continued to pay yearly foreign-corporation excise of one hundredth of 1 per cent of the authorized capital until 1909, when the same was arbitrarily doubled, so that thereafter the excise levied under section 56 of part III of chapter 490 of the Acts of 1909 became fixed at, and still amounts to, one fiftieth of 1 per cent of the authorized capital.

That simultaneously, by the same statute, the previously existing statutory right and privilege of foreign corporations to deduct from their excise tax the amount of property taxes assessed upon them by the cities and towns of this state was repealed as to foreign corporations, but retained for the benefit of domestic corporations engaged in the same line of business.

No similar change was then made by way of doubling or otherwise increasing the excise taxes of domestic corporations engaged in the same line of business.

Prior to 1909, relying upon the conditions and taxes prescribed for foreign corporations under chapter 437 of the Acts of 1903, and in compliance therewith, your petitioner had duly entered this state for the purpose of doing business therein, or had continued business therein, and had lawfully acquired, between 1903 and 1909, a large amount of permanent and valuable property therein, and paid property taxes thereon.

9 By the passage of the said Act of 1909 its foreign-corporation excise tax was arbitrarily doubled, and it was deprived of its right to deduct from its excise the amount of local property taxes, pursuant to a discriminating method of taxation not employed at the same time as to domestic corporations of the same kind carrying on precisely similar business, contrary to the "equal protection of the laws" clause of the federal Constitution.

5. That section 56 of part III of chapter 490 of the Acts of 1909 in effect provides that your petitioner, as a foreign corporation having an usual place of business in this state, used almost wholly for purposes of interstate commerce, as condition of its transacting or continuing to transact any domestic or local business in this state, in conjunction with its interstate commerce, even though merely incidental to its interstate commerce, and however trifling or relatively unimportant it may be, must pay an annual excise tax amounting to one fiftieth of 1 per centum of the par value of its total authorized capital stock, but not exceeding a maximum tax of $2,000 per annum.

6. That under and pursuant to the provisions of section 56 of part III of chapter 490 of the Acts of 1909 the said commonwealth, the respondent herein, assessed and imposed upon your petitioner an excise tax for the year 1913 of one fiftieth of 1 per centum of its total authorized capital stock at par, such tax amounting to $1,400, and payment of said tax was exacted from your petitioner simultaneously with the making of its annual return under said chapter 490, and as a condition of its being allowed to file such return or to continue to do its business in this state.

That your petitioner duly paid such excise tax so assessed upon it to the treasurer of said commonwealth on March 4, 1913.

That said excise tax was illegally assessed, imposed, and exacted, and your petitioner is entitled to recover the same from the said commonwealth, under this petition, pursuant to the provisions of section 70 of part III of said chapter 490.

That the said excise tax should not have been assessed or imposed upon your petitioner, or exacted from it, for the following reasons; namely:

(*a*) Because the said section 56 of part III of chapter 490 of the Acts of 1909 is unconstitutional as applied to your petitioner, a foreign corporation transacting in this state interstate commerce almost exclusively, or, in any event, in connection therewith, only an amount of domestic or local business which is not really substantial nor at all commensurate with the amount of the tax charged for the privilege.

Such excise tax directly and substantially burdens the interstate commerce of your petitioner, thus constituting an unlawful regulation of interstate commerce, in contravention of the "commerce" clause embodied in section 8 of article I. of the federal Constitution.

(*b*) Because said section 56 is unconstitutional as applied to your petitioner, a foreign corporation owning real estate and other property situated wholly outside of said commonwealth, and holding in this state only a comparatively slight portion of its total property, and paying property taxes thereon, for said section 56, in its necessary effect, subjects its property outside of this state to taxation, and undertakes, in effect, to make the payment of a tax upon all its large and valuable properties beyond the borders of this state a condition of its transacting a comparatively trifling amount of domestic business within this state, thereby depriving it of its property without "due process of law," in violation of the Fourteenth Amendment to the federal Constitution.

(*c*) Because said section 56 is unconstitutional and void as applied to your petitioner, a foreign corporation which, prior to the passage of the said section 56 of the 1909 statute, and between 1903 and 1909 had lawfully acquired, and still owns, a large amount of permanent and valuable property in this state, in compliance with the previously existing tax law of 1903, governing the taxation and rights of foreign corporations, and in full reliance thereon, and which, by reason of the new system of taxation adopted in 1909, became, and still is, taxed by a discriminating method, involving large increases of its taxes, which was not then or thereafter employed as to domestic corporations of the same kind as your petitioner, carrying on a business precisely similar to that of your petitioner, thereby depriving your petitioner of the "equal protection of the laws" guaranteed by the Fourteenth Amendment to the federal Constitution.

Wherefore your petitioner brings this petition against the said commonwealth, the respondent herein, and prays that the aforesaid tax, amounting to $1,400, paid to the commonwealth by your petitioner may be adjudged to have been illegally assessed, imposed, and exacted, and that the amount thereof may be returned to your petitioner by said commonwealth, with interest thereon from the date

of payment, and costs, and for such other and further relief as this Honorable Court may deem meet.

CHENEY BROTHERS COMPANY,
Petitioner.

By CHAS. A. SNOW,
W. P. EVERTS,
Its Solicitors and Counsel.

Filed February 20, 1914.

11 No. 19803, Eq.

Respondent's Answer.

For answer to the amended petition, the respondent says that the petitioner is a foreign corporation within the meaning of chapter 437 of the Acts of 1903; that the petitioner has complied with all the provisions of said chapter; that the tax assessed against the petitioner, as set forth in the amended petition, was legally assessed.

Further answering the respondent denies each and every item, allegation, and amount in the amended petition contained and inconsistent with this answer, as fully and completely as if each were separately and in its order set forth and denied.

THOMAS J. BOYNTON,
Attorney General,
By ROGER SHERMAN HOAR,
Assistant Attorney General.

Filed February 28, 1914.

February 28, 1914. Issue joined.

Agreed Statement of Facts.

It is hereby agreed by and between the several petitioners and the respondent in the above-entitled causes, ordered to be tried and heard as one consolidated cause, that for the purposes of these causes the following facts shall be taken as true, and that the parties shall be entitled at any hearing thereon to refer to any of the statutes or decisions of this commonwealth and any decisions of the United States:

The pleadings are not regarded by the parties as material to the determination of the questions presented, but may be referred to if material.

Each of the above causes is a petition in equity brought under section 70 of part III of chapter 490 of the Acts of 1909, for an abatement of an excise tax paid by the petitioner under section 56 of this part and chapter.

Each of the petitioners is a foreign corporation duly admitted to do business in this commonwealth, pursuant to the provisions of the corporation law of this commonwealth, and since its admission has continued to do business within the commonwealth and has complied with the requirements of the corporation law.

12 No business is done in Massachusetts by any of the petitioners except as stated herein.

All statements of fact, when the context will admit, relate to the date of assessment and payment of the tax now sought to be abated.

Each of the petitioners has appointed the commissioner of corporations as its attorney for the service of process under the provisions of section 58 of chapter 437 of the Acts of 1903. In the year for which the tax in question was assessed each of the petitioners filed, without protest (except in the case of the Lanston Monotype Machine Company and the Champion Copper Company, which petitioners each protested the payment of the tax), a certificate of condition under the provisions of section 60 of said chapter at the same time that it paid the tax in question.

The pleadings in each of the causes are the same as those in the case of Cheney Brothers Company, with the exception of names, dates, and amounts.

The following are the special facts with relation to each of the petitioners:

Cheney Brothers Company.

The petitioner is a corporation with an authorized capital stock of $7,000,000, incorporated under the laws of Connecticut. It is authorized by its charter, among other things, to sell silk, the purposes for which it is incorporated being set forth in its charter as follows:

"manufacturing fabrics of silk, cotton, flax and other materials and other manufactures, composed in whole or in part, of silk, cotton, wool, flax or other materials, and manufacturing machinery, grinding grain, and manufacturing other fabrics in the most advantageous manner, and for the purpose of trade; and by that name they and their successors and assigns shall be and they are hereby authorized to purchase, take, hold, occupy, possess and enjoy, to them, their successors and assigns, any goods, chattels and effects, of whatever kind they may be, the better to enable them to carry on such business in a profitable manner; also to purchase, take, hold, occupy, and enjoy such lands, tenements or hereditaments, in the county of Hartford, as shall be necessary for the accomplishment of the purposes of the corporation, and the same or any part thereof, to sell, lease and dispose of at pleasure, or to take a lease or leases of any such lands and real estate for a term or terms of years; also
13 to sue and be sued, plead and be impleaded, defend and be defended, answer and be answered to in all courts of record or elsewhere."

The petitioner seeks to recover a tax of $1,400, an amount equal to 1/50 per cent of its authorized capital stock.

The petitioner maintains in Boston an office and salesroom, with an office boy, one office salesman, and four traveling salesmen who cover New England. No bookkeeper is there employed, and no books of the company kept here, except copies and records of orders. No collections are made at this office, and no deposit of funds is made here except for the expenses of this office, which

money is sent to this office from the treasury in New York, to be deposited here for the purposes of paying the expenses of this office. The average amount of deposit for this purpose is about $250. The salaries of the salesmen and the rent of the office are paid directly by check from the company's office in Connecticut.

There is no stock of goods kept in the local office, but only samples. The salesmen take orders, which are subject to approval by the home office in Connecticut, and the goods are shipped directly to the customer from Connecticut, on the usual commercial terms of thirty or sixty days' credit. The contract of sale is completed in Connecticut, and title passes in Connecticut.

Lanston Monotype Company.

The petitioner is a corporation with an authorized capital stock of $10,000,000, organized under the laws of Virginia. It is authorized by its charter, among other things, to sell typesetting machines, the purposes for which it is incorporated being set forth in its charter as follows:

"The said company may acquire, secure, own, use, develop, control and operate inventions, improvements, and patents, useful in the art of printing, and especially the inventions, improvements, and patents of Tolbert Lanston for making, setting, and justifying type mechanically, and all appliances, devices, processes, and improvements therewith connected, or useful in the operation of such inventions, and may sell, grant, assign, and lease or license to others the said inventions, improvements, devices, and processes, or any privilege thereunder or therewith connected; and may make, use, sell, assign, and lease or license to others any and all machines, apparatus, appliances, and devices suitable for, or connected with, the use of such inventions, or improvements, or any of them; and
14 said company may acquire, use, and dispose of any property, rights, licenses, patents, inventions, or other property suitable for or advantageous to the conduct of the business of the Company."

It seeks to recover a tax of $2,000, which represents the maximum foreign-corporation excise tax.

Its factory is located in Philadelphia, where it is engaged in the business of manufacturing machinery. It has an office in Boston, in which there is a manager, office manager, and four inspectors, all six of whom act as salesmen. There is no stock of machines kept here; but there is a stock of repairs for breakable parts. Any repair parts that are not immediately needed are supplied from Philadelphia. This stock is worth about $1,000. About one half of the repairs made on the petitioner's make of machine in New England are supplied from this stock, which is replenished weekly from the home office. The repairs supplied from this office amount to about $12,000 annually. The total business of the Boston office is about $200,000 a year. About 20 per cent of each of these sums represents profit. The keeping of this stock here is an inducement to customers to buy the petitioner's machines. The abandonment of it would deprive them of that advantage over their competitors. There are two con-

siderable competitors, the Linotype Company and the Intertype Company. These competitors keep no such stock of repair parts here, but do in New York. The sale of monotype machines by the petitioner is conducted as follows:

Orders are taken by the local salesman for machines subject to the approval of the president of the company at the home office in Philadelphia, the local office having the right, under the contract of sale, to cancel it within seven days, which they do if it does not meet the approval of the president of the company. Unless canceled, it continues in effect. The machines are shipped from Philadelphia to the customer, by delivering the same to a railroad in Philadelphia, consigned to the purchaser as consignee. The bill of lading is sent to the local bank, and is given by the bank to the customer after he has made the initial payment, which is about one tenth the value of the machine. The purchaser pays the freight. The title to the machine continues in the petitioner until final payment or payments are made.

Locomobile Company of America.

The petitioner is a corporation with an authorized capital stock of $5,000,000, incorporated under the laws of West Virginia. It is lawfully authorized by its charter to sell automobiles, the purposes for which it is incorporated being set forth in its charter as follows:

15 "Purchasing, leasing or otherwise acquiring lands and buildings for the erection and establishment of a manufactory or manufactories and workshops with suitable plants, engines and machinery with a view to manufacture, purchase, sell or otherwise deal in automobiles, autotrucks, horseless carriages, trucks and vehicles of every kind and description, and to manufacture, purchase or otherwise acquire, hold, own, mortgage, pledge, sell, assign and transfer, or otherwise dispose of, to invest, trade, deal in and deal with goods, wares, merchandise and property of every class and description; to purchase or otherwise acquire patents, patent rights and privileges, improved or secret processes for or in any way relating to all or any of the objects aforesaid; to grant licenses for the use of or the sale or otherwise deal with any patents, patent rights, privileges, improved or secret processes, acquired by the Company; to sell, lease or otherwise deal with real or personal property of the Company, and to carry on any other business which may seem to the Company capable of being conveniently carried on in connection with the above or calculated directly or indirectly to enhance the value of the Company's property or rights."

It seeks to recover a tax of $1,000, being a sum equal to 1/50 per cent of its authorized capital stock.

Its factory is located in Bridgeport, Conn., where it is engaged in the business of manufacturing and selling automobiles. It occupies in Boston, under lease, as an office, salesroom, and repair shop for the purpose of repairing its own make of cars and second-hand cars taken in exchange for its own make, a three-story building, 150 by

150 feet. There is a local manager and a sales force. The employees number thirty, ten of them being in the sales and office force and twenty in the repair department. Its business at this office is conducted as follows: Orders are taken in the local office for automobiles. The order, signed by the purchaser, is sent to the home office in Bridgeport, Conn., for approval. The order of the customer is taken subject to the approval of the home office of the company in Bridgeport, Conn. At the time of signing the order the purchaser makes an initial payment of 10 per cent of the purchase price in one third of the cases, paying the balance at the time of delivery of the car. In one third of the cases the purchaser pays the entire consideration at the time of delivery of the car. In the remaining third of the cases the company accepts, as a part of the con-
16 sideration, a car, of whatever make, previously used by the purchaser, and the balance of the consideration is paid in cash by the purchaser at the time of the delivery. The written order, signed by the purchaser, is sent by the Boston representative of the company to the company's home office at Bridgeport, Conn., for approval, and, if approved, the company then notifies its representative to that effect. The usual course of business is for the purchaser to sign an order filled in on a printed blank, which reads as follows:

"Car Order.

Customers' Cars are Driven by Our Staff Only at Customers' Risk and Responsibility.

All Contracts and Sales are Made Without Liability on our Part For Delay, Arising From Strikes, Accidents or Other Causes Beyond Our Control.

The Locomobile Company of America.

Executive Offices: Bridgeport, Conn.

—— —, 191–.

To the Locomobile Co. of America, of Bridgeport, Conn.:

You are hereby authorized to enter —— order on your books for one Locomobile Type ——, as per specifications given below, and for which ——* agree to pay the sum of —— Dollars same to be delivered f. o. b. Bridgeport, Conn.

Terms: —— Dollars payable on signing this order; balance —— Dollars payable upon notification that the Locomobile is ready for delivery.

In the event of the failure or refusal of the purchaser promptly to carry out this contract and pay the balance due thereon, the cash payment may at the option of the seller be retained by it as liquidated damages.

Purchaser	Via
Address	Monogram
Shipping Date on or about	Body Striping
Style or Body	Mouldings
Body Color	Chassis Striping
Color of Upholstery	
Chassis Color.	
Tires	

For Regular Equipment, See Catalogue.

17 *Extras at Extra Cost.*

Glass Wind Shield	Clock
Seat Covers	Special Horn
Baggage Rack	Searchlight
Speedometer Odom. (Comb.)	
Shock Absorbers	
Remarks	

Order taken by —— ——.
Signed
—— ——,
Purchaser.

N. B.—In filling out the above Specifications please be careful to specify exactly what is required, as after this order has been entered it is impossible to make any changes without delaying delivery of car.

Form 81B—2M-3-11-13.

[In Margin:]

☞ It is agreed that this written order expresses the entire contract; and further that no alteration or addition thereto shall be of any force or effect whatever unless the same be made in writing."

This order is also signed after the words "order taken by" by the salesman, and is forwarded by the local branch of the company in Boston to the home office. The office in Massachusetts is in charge of a local manager, who, in making sales and deliveries, acts as the agent of the company, and is paid a salary by it.

All deliveries of new machines made by the company are delivered from the company's factory in Connecticut, as follows: The machine is delivered from the company's factory in Bridgeport to the railroad company in Bridgeport, consigned to the company in Boston. The company, through its Boston agent, receives it from the railroad cars in Boston, takes it to its Boston place of business, and from there, upon final payment, including freight charges from Bridgeport, being made, delivers it to a purchaser who has ordered such a car and has signed one of the orders above stated. All such deliveries are made by the company's local representative, who is act-

ing as agent in behalf of the company, and such deliveries comply with the terms of such orders.

No shipments of cars are made by the company into Massachusetts, except cars used in fulfilment of orders, as aforesaid, previously given and approved.

18 The company maintains at its place of business in Boston, as a part of its business, a used-car department, where it sells used cars of its own and other makes which have been taken by it as part consideration in the sale of new cars sold in the manner above set forth. A stock of such cars is kept here for sale. In determining the price of these cars the local office is furnished a list of prices by the home office, and the sales are made from orders, as stated above. The business done in this department amounted, during the year for which the tax in question was paid, to $41,000, out of a total business of $246,000 done by the company here during the same period. This is the usual course of all companies engaged in the automobile business.

The company's experts would testify that, in their opinion, an abandonment of the second-hand-car business would seriously impair their sales of new cars unless all their competitors, including domestic corporations, should at the same time abandon this method of doing business.

The petitioner keeps in its repair shop in Boston a stock of repair parts, used in repairing its own make of machines previously sold by the Locomobile Company of America, regardless of manner and place of sale. The stock of repair so kept amounts to $6,000, and the repairs made at the Boston place of business amount to $7,500 annually. This is the usual course of all companies engaged in the automobile business.

The company's experts would testify that, in their opinion, an abandonment of the repair business would seriously impair their sales of new cars unless all their competitors, including domestic corporations, should at the same time abandon this method of doing business.

Northwestern Consolidated Milling Company.

The petitioner is a corporation with an authorized capital stock of $2,250,000, incorporated under the laws of Minnesota. It is authorized by its charter, among other things, to sell flour, the purposes for which it is incorporated being set forth in its charter as follows:

"The purchase of wheat for manufacture and the manufacture thereof into flour and other products into which the same is susceptible of being manufactured, and the marketing of such flour and other products, and the purchase or erection or leasing, and the maintaining, of mills, elevators, warehouses and other structures necessary for the said business."

19 The petitioner seeks to recover a tax of $450, being an amount equal to 1/50 per cent of its capital stock.

Its mills are located in Minnesota, where it is engaged in the

business of manufacturing and milling flour and grain. It maintains an office in Boston. The Boston office has charge of the business of the company in all of New England and part of New York. Sixteen salesmen travel out of this office. Four of them call on the trade in the city of Boston; three call on the Massachusetts trade outside of Boston; and nine on the remaining territory in New England and New York. These salesmen take orders from retailers for flour and other grain products. These orders are turned over to the nearest wholesale grocer, and the petitioner has nothing further to do with them, the situation being that the petitioner's salesman, although not in the employ of the wholesaler, is selling the goods for the wholesaler. The wholesaler supplies the goods from his stock to the retailer, and the retailer pays him. The wholesalers buy their stock from the petitioner by giving an order to the Boston office. This order is sent to the petitioner's office in Buffalo or Minneapolis and the goods are shipped to the wholesaler, the bill of lading, with purchaser named as consignee, and having a sight draft attached, being sent to the local bank.

The sales made by the Boston office amount to about $4,500,000 per year.

One half of the sales of the Boston office are for delivery in Massachusetts. The Boston office does about 18 per cent of the total business of the petitioner. In no case is there any approval of orders by the home office. The petitioner keeps on hand in Boston in the warehouses of the railroad a small stock from which it makes sales for delivery in Massachusetts. The sales made in this way are less than 1 per cent of the total sales made by the Boston office for delivery in this state.

Copper Range Company.

The petitioner is a corporation with an authorized capital stock of $2,500,000, organized under the laws of Michigan. It is authorized by its charter, among other things, to hold stock in mining companies and to hold mining land in Michigan, the purposes for which it is incorporated being set forth in its charter as follows:

"To engage in and carry on the business of mining, refining, smelting and manufacturing any and all kinds of ores, minerals and metals, and to do any and all acts and things, and transact any and all other business incidental to the purposes aforesaid."

It seeks to recover a tax of $500, being an amount equal to 1/50 per cent of its authorized capital stock.

The articles of association state that "the place where the business office of this corporation is located, without the limits of the State of Michigan, is Boston, Massachusetts, and the place where the office for the transaction of business within the State of Michigan is located is Houghton, Michigan." The laws of Michigan may be referred to.

This company is a holding company, the chief asset of which is 50 per cent of the stock of the Champion Copper Company, a foreign

corporation herein referred to, which is a copper company operating a mine in Michigan and paying here the Massachusetts foreign-corporation tax.

It also holds the stock and bonds of a Michigan railroad and certain mineral lands in Michigan. It transacts no business in Massachusetts in the way of buying or selling goods or stocks.

Its only activities in Massachusetts, except as hereinafter stated, consist in receipt of dividend from its holdings of stock in foreign corporations, the deposit of the same in Boston banks, and the payment of the same, less officers' salaries and expenses to its stockholders by way of dividends.

Practically its entire stock, i. e., more that 99 per cent thereof, is owned by another holding company, the Copper Range Consolidated Company, also paying the Massachusetts foreign-corporation tax.

Its treasurer is also treasurer of the Copper Range Consolidated Company having active duties in that capacity.

It holds its directors' meetings three or four times per year, and holds its annual stockholders' meeting in an office of the Copper Range Consolidated Company. Three or four times a year it declares and pays dividends, and it monthly receives dividends from other foreign corporations of which it holds stock, keeping a bank account in Boston for this purpose.

The president and treasurer are residents of Massachusetts, and are also the president and treasurer of the Copper Range Consolidated Company.

The company transfers no stock here. Its keeps its corporate records and financial books of account here.

21 The president and treasurer, under authority of a general vote of the board of directors, vote the stock held by it.

The White Company.

This petitioner is a corporation with an authorized capital stock of $3,000,000, established under the laws of Ohio for the purpose of—

"manufacturing automobiles and automobile parts of every kind and description; to manufacture, buy, sell, deal in, or otherwise acquire, hold, own, mortgage, pledge, sell, assign, transfer or otherwise dispose of, invest, trade, deal in any goods, wares and merchandise of every class and description; to acquire by purchase or otherwise, all of the real and personal property necessary or convenient for use in connection with and in carrying on the business herein mentioned, or any part thereof, and to sell and dispose of the same; to acquire the good will, rights and property, and to take over the whole or any part of the assets and liabilities of any person, firm, association or corporation, and to pay for the same in cash, in stock of this Company, or otherwise; to acquire, own, hold, pledge, sell, assign, transfer or otherwise dispose of shares of stock, bonds, mortgages or other securities of other corporations kindred but not com-

peting; to from time to time sell, assign, transfer or otherwise dispose of any or all of its property, but no sale of all of its property shall be made except upon a vote of the holders of a majority of the capital stock of the corporation outstanding at the time of the said sale or disposal, and upon such vote of the stockholders being had, the Board of Directors shall sell upon such terms and conditions as may be authorized by such vote."

The petitioner seeks to recover a tax of $600, representing 1/50 per cent of its authorized capital stock.

Its factory is located in Ohio, where it is engaged in the business of manufacturing automobiles. The petitioner admits a real and substantial local business, consisting of maintaining a service station and garage separable from its interstate business, and does not intend in this petition to raise any question under the "commerce" clause, but only under the "equal protection of the laws" clause of the Constitution of the United States.

The petitioner acquired, after 1903 and prior to 1909, land at 341 Newbury street, and built thereon a seven-story building
22 made of brick, concrete, and steel, with wide floors, no posts, and very heavy steel construction, specially adapted for use as a garage. This building had two corner elevators, and below the first floor were installed three 500 gallon gasolene tanks, and on the first floor was a turn-table. The investment thereon approximated $175,000.

The petitioner further acquired, after 1903 and prior to 1909, for $100,000, buildings and about 7,000 square feet of land at 320 Newbury street, which was then used as a boarding stable, and was altered and remodeled by the company, at an expense of $22,000, for a service station. The partitions were removed, the floors were strengthened by heavy steel concrete construction, the building was made fireproof, and gasolene tanks and elevators were placed in the building to make it peculiarly adapted for use of automobiles. The petitioner has not used or occupied this piece of property for several years past, and has had the property for sale or lease, but has not yet sold or leased it. The petitioner, at the date of payment of this tax, owned both of these pieces of property.

Champion Copper Company.

The petitioner is a corporation with an authorized capital stock of $2,500,000, incorporated under the laws of Michigan. It is authorized by its charter, among other things, to sell copper mined by it, the purposes for which it is incorporated being set forth in its charter as follows:

"to mine, smelt, refine, and manufacture copper, iron, silver, mineral coal and other ores and minerals, and to do any and all other things incident thereto."

It seeks to recover a tax of $500, being an amount equal to 1/50 per cent of its authorized capital stock.

It transacts no business in this state producing profit other than

as stated herein. All sales of its copper to Massachusetts purchasers contemplate and require transportation and delivery, by means of common carriers, from Michigan into Massachusetts.

No deliveries are made in Massachusetts of the company's products except such as are delivered from Michigan.

No local stock of copper from which deliveries or sales are or can be made is kept in Massachusetts. This company owns no assets or property in Massachusetts except a bank account of not over $100,000, resulting exclusively from sales and deliveries of its copper.

23 The articles of association state:

"The place where the business office of this Corporation is located, without the limits of the State of Michigan, is Boston, Massachusetts, and the place where the office for the transaction of business within the State of Michigan is located, is at the mine location of the Company in Adams Township, Houghton County, Michigan.

The laws of Michigan may be referred to.

Its entire capital stock, except its temporary bank deposits, as above, is invested in its mining lands and mine located in Michigan, and in the equipment thereof. For the purposes of this case the entire property of this petitioner may be taken to be of the value of $2,500,000.

The Champion Copper Company owns a copper mine located in Michigan, from which its entire product is mined.

After being mined in the form of copper rock it is crushed at the company's stamp mill, also located in Michigan, and is thence transported by rail to the smelter owned by the Michigan Smelting Company, also located in Michigan, where it is smeltered and refined and made ready for delivery by the smelting company.

Acting as agent for the Champion Copper Company and in accordance with the orders of that company, the smelting company attends to the shipment of the copper from the smelter in Houghton, Mich., to the railroad in Houghton, which there receives the copper f. o. b. consigned for delivery to purchasers throughout the United States and foreign countries.

The bill of lading is in the name of the purchaser, as consignee, who pays freight charges.

The contracts for sales of the company's product are entered into in New York between the purchaser and the copper company, represented by its selling agent, which acts as agent for the company in entering into such contracts.

The selling agent represents the copper company, as its agent, only with respect to the making of contracts of sale and the collections of the purchase price from purchasers and the remitting of the proceeds of sales to the treasurer's office of the copper company in Boston.

The selling agent has no supervision or direction of deliveries of goods sold or agreed to be sold. Deliveries under contracts of sale entered into by the selling agent are exclusively under the direction, supervision, and control of the treasurer's office of the copper company in Boston.

24 The selling agent of the copper company is the United Metals Selling Company, which has its place of business in New York. It acts as such selling agent under a written contract, making it the "exclusive Agent for Selling upon commission all the products of the mines" of the copper company.

"For all sales so made" by the selling agent, the copper company agrees to pay a commission of 1 per cent "on the price of all said products sold" by the agent.

The selling contract provides that "the prices and terms of sale are to be prescribed by" the copper company "reasonably, according to the market rates from time to time."

All sales are guaranteed by the selling agent.

"All freight and other charges and expenses" (if not borne by the purchasers), except expenses incurred in making sales, are borne by the principal.

The copper company from time to time notifies the selling agent of the amount of copper on hand which it desires to sell and as to the price at which the agent is authorized to sell the same.

The agent then proceeds to sell the same.

It sends weekly reports to the treasurer of the copper company of the "following sales for your account," stating the amount sold, the price, the terms of sale, the month of delivery, and the name and address of the purchasers to whom the copper is to be consigned.

The agent has nothing to do with deliveries under such contracts of sales.

All deliveries of the copper company's products under such contracts of sale are ordered, superintended, and directed by the treasurer of the copper company at his Boston office, where the bookkeeping covering such sales and deliveries is done. Deposits of funds arising from such sales and deliveries are made in Boston and other banks, and the funds so received, after payment of the copper company's expenses, are distributed in dividends among that company's stockholders.

Monthly detailed accounts are sent by the selling agent, covering its sales in behalf of the copper company and detailed expenses chargeable against that company, and the net proceeds of such sales are transmitted from time to time to the treasurer of that company, the collections of the purchase price being made by the agent in behalf of its principal.

In addition to the weekly reports from the agent notifying the treasurer of contracts of sale entered into by the agent during the week and the name of the purchaser, the agent sends a re-
25 quest addressed to the copper company at the treasurer's office in Boston in these terms: "Please ship as follows: To A. B." (stating name and address of the purchaser in the contract of sale negotiated or entered into in New York by the agent in behalf of the copper company; also the quantity and description of the copper contracted for, the size, and the shipping date).

The treasurer's office in Boston thereupon orders the smelter in Michigan to ship the copper thus contracted to be sold. Pursuant to the treasurer's direction, the smelter in Michigan thereupon ships

the copper by delivering the same in Houghton, Mich., to a common carrier f. o. b., consigned for delivery to the Massachusetts purchaser, or the purchaser in states other than Michigan or in foreign countries, and accompanied with a bill of lading, in which the Michigan Smelting Company, acting as agent for the copper company, is named as consignor and the purchaser as consignee.

The usual course of business is to grant credit for thirty to ninety days, when the purchase price becomes payable.

The copper company maintains its treasurer's office in Boston for the purpose of ordering, superintending, and directing deliveries of copper under contracts of sale made or negotiated by its agent in New York, as aforesaid; also for the purpose of informing its selling agent, as aforesaid, of the amounts of copper to be sold, and the prices at which it is to be sold; also for the necessary bookkeeping in connection with such sales and deliveries; also for depositing funds received from such sales in Boston and other banks; also for payment of its office expenses and salaries of its officers; also for distribution of dividends among its two stockholders, its entire stock being owned in equal shares by the Copper Range Company and the St. Mary's Mineral Land Company, both foreign corporations, which are holding companies holding shares in foreign corporations, and paying the foreign corporation excise tax in question.

At the treasurer's office in Boston the treasurer and president of the company have their offices. There is an office force here of some four or five bookkeepers and stenographers required for the use of the treasurer's business as herein set forth. The treasurer's office exercises no supervision, direction, or management of the company's mine in Michigan, which is under the exclusive management and direction of a general manager located in Michigan, who, under vote of the directors of the company, has entire charge of the management of the Michigan mine and any improvements or repairs made upon the Michigan property.

The running expenses of all mining operations and management in connection with the Michigan mine are paid in Michigan
26 by the general manager from a "mine account." The treasurer from time to time sends funds from Boston for this "mine account" to the general manager in Michigan.

The treasurer's office in Boston is maintained and used for the purposes stated herein, and for no other purposes.

The board of directors of the company, seven in number, are, with two exceptions, residents of Massachusetts, as are also the president and treasurer.

Under the by-laws, the board of directors have, by law, the general management and control of all the business and property of the company; but, as stated, have delegated to the general manager of the company, resident in Michigan, the exclusive management and control of the mining operations in Michigan and the mining property there located.

In the course of a year the board of directors hold several directors' meetings at the treasurer's office in Boston.

At these meetings reports are submitted from the treasurer and

the general manager, and dividends are declared from the proceeds of the sales and deliveries above referred to.

The chief purpose of such meetings is to declare such dividends. At such meetings the directors also organize and elect officers.

Occasional votes are there passed authorizing the execution of deeds conveying rights of way or other easements in the company's Michigan lands.

No votes are considered or passed by the directors which exercise management, control, or direction over the mine or mining operations in Michigan, which, in fact, are left exclusively under the charge of the general manager, resident in Michigan. No other votes are passed or business transacted at such meetings in any way material hereto except as stated herein.

Under the by-laws the powers of the president of the company are to preside at meetings of directors, sign contracts and checks, to sign stock certificates, and to do other incidental matters usually incident to the office of president of such a company, but with no power, under the by-laws, to exercise management or control over the mining operations and mine in Michigan.

No transfers of the company's stock are made or registered in Massachusetts.

The company distributes large dividends to its two stockholders, arising exclusively from the sales of its copper, above referred to. It has no other source of income.

The company's income is derived wholly from the proceeds of said sales. It derives large profits from such sales. No part
27 of the profits derived from such sales goes to its selling agent, the United Metals Selling Company, which, as stated, receives as a selling commission 1 per cent of the selling price, and nothing further.

The price at which copper is sold is practically the same at the mine and at places remote from the mine, the freight charges being small, and, in the usual course of business, paid by the purchaser.

28 CHARLES A. SNOW,
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THOMAS J. BOYNTON,
Attorney General,
By ROGER SHERMAN HOAR,
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Filed February 28, 1914.

Petitioners' Requests for Rulings.

The petitioners in each and all of the above suits, heard as one consolidated cause, request the Court to make the following rulings of law:

1. The foreign-corporation excise (St. 1909, c. 490, part III, sec. 56), under the construction of the statute heretofore adopted by this Court, does not apply to the several petitioners. They are accord-

ingly severally entitled to recover the taxes paid by them respectively.

2. If applied to the several petitioners, the foreign-corporation excise tax of Massachusetts, contained in section 56 of part III, c. 490, of the Acts of 1909, would be unconstitutional and void because in conflict with the "commerce" clause contained in section 8 of article 1 of the federal Constitution.

3. If applied to the several petitioners, the said excise tax would be unconstitutional and void because in contravention of the "due process of law" clause contained in the Fourteenth Amendment to the federal Constitution.

4. If applied to the several petitioners, the said excise tax would be unconstitutional and void because in conflict with the "equal protection of the laws" clause contained in the Fourteenth Amendment to the federal Constitution.

5. If applied to the several petitioners, the said tax would be unconstitutional and void under the principles set forth in the Western Union and Pullman decisions (216 U. S. 1, 56).

These decisions govern the decision of the cases at bar.

29 The principles of the Western Union and Pullman decisions are not confined to telegraph and sleeping-car companies, or to public-service corporations. They have equal application to commercial and trading corporations engaged in interstate commerce.

The decision in Attorney General v. Electric Storage Battery Co., 188 Mass. 239, establishes that the "commerce" clause is not confined to public-service corporations, but applies equally to manufacturing companies making sales in Massachusetts for delivery from a factory located in another state, and that the said tax would be unconstituional if it applied to such a company exclusively engaged here in making such sales.

5 (*a*) Under the decisions of the United States Supreme Court, the said excise tax would be unconstitutional if applied to a foreign corporation transacting in this state a local business in connection with interstate commerce, unless the domestic business is "real and substantial" and not so connected with its interstate commerce as to render a tax for the local privilege a burden upon the interstate portion of the company's business.

6. In order to constitute a "real and substantial" local business, it must appear that the amount of local business and the value of the privilege bear some fair and reasonable relation to the amount of the tax imposed for the privilege.

7. If sales or deliveries made out of a local stock of goods in this state are only trifling in amount, as compared with the interstate commerce transacted in connection with such local business, the domestic business so transacted is not "real and substantial."

8. The reality and substantiality of such local business must be determined by taking into account, among other factors, the percentage of the company's local business as compared with its interstate commerce transacted here.

9. If the percentage of local business is less than 1 per cent of the

total sales made in this state, the local business is, as matter of law, too trifling to constitute a "real and substantial" local business.

10. If the local or domestic business is a mere incident to its interstate commerce transacted here, the said tax imposed for the privilege of carrying on such local business is unconstitutional under the "commerce" clause.

11. If the total profits from such local sales do not equal the amount of the tax paid for the local privilege, such domestic business is not "real and substantial" and the said tax is unconstitutional as applied to such a company.

12. If a small local stock is kept, mainly for the convenience of small consumers and not chiefly for profit, but for purposes of advertising and increasing the demand of small consumers, with the ultimate object of increasing the amount of interstate sales in car-load lots, and if such sales from local stocks amount to less than 1 per cent of the interstate commerce transacted in Massachusetts, and the abandonment of such local sales would result in a substantial decrease in the amount of sales in car-load lots through interstate commerce, the said tax, if applied to such a company as the Northwestern Consolidated Milling Company, would be unconstitutional.

13. If applied to the petitioners, the amount of the said excise is unduly great, having reference to the real value of the local business and the property used therein, and is so disproportioned to the volume and profits of the local business and to the value of the privilege taxed that it should be regarded as a mere device to reach or burden the interstate portion of the company's commerce, property, and profits, and, consequently, would be unconstitutional.

14. If the petitioner is engaged in this state in the work of conducting some kind of interstate commerce as its principal function, and in connection therewith a relatively small percentage of local commerce, a tax measured by the entire capital, both interstate and domestic, would be unconstitutional, because its necessary effect is to burden, directly and substantially, the interstate portion of the company's capital, business, and property, and is, consequently, based on an unlawful measure.

15. The business transacted by the petitioner within the limits of this state is wholly commerce.

The business actually transacted here, for which the petitioner is chartered, among other chartered purposes, is in itself commerce.

The fact that it is also chartered to manufacture or produce outside of Massachusetts and does, in fact, manufacture or produce elsewhere has no legitimate bearing upon the nature and character of its Massachusetts business.

If this corporation is engaged in Massachusetts in the business of selling and shipping its products in interstate commerce, it is, to that extent, engaged in the business of carrying on interstate commerce, and is entitled to the protection of the federal Constituiton against laws burdening commerce of that character.

16. Interstate commerce of all kinds is within the protection of

the Constitution of the United States, including sales of goods negotiated in one state for delivery in or from other states.

Such sales, contemplating and requiring transportation
31 and delivery from another state into this state, constitute transactions of interstate commerce, and are entitled to the protection of the "commerce" clause against laws burdening commerce of that character.

In case of such sales it matters not whether title passes in the state of the seller or in that of the purchaser, provided that transportation and delivery from one state to another is contemplated and required.

It is not within the authority of a state to tax, directly or indirectly, sales or deliveries of that description or the business of transacting such sales or deliveries or the place where such business is carried on, managed, or directed, or the receipts therefrom are handled or deposited.

17. If applied to the White Company, the said tax would be unconstitutional under the "equal protection of the laws" clause of the Fourteenth Amendment.

Under the principles of Southern Ry. Co. v. Greene, 216 U. S. 400, the said tax would be unconstitutional as applied to a company which acquired a large amount of permanent and valuable property in this state prior to the Act of 1909, imposing the said tax and doubling the amount of the tax as existing under preceding legislation (Acts 1903, c. 437, sec. 75), under which the company had entered this state and acquired such property, when at the time of imposing the tax of 1909 no similar changes in taxation were made with reference to domestic corporations of the same kind carrying on a precisely similar business.

18. Particularly is this true, as stated in the seventeenth request, where the permanent and valuable property thus acquired prior to the Act of 1909 is of a peculiar nature, like automobile garages or service stations, railroad stations, telegraph offices, or other property not readily adaptable to ordinary real-estate uses, or which may not be abandoned and converted to other uses except at large expense and loss.

19. The said tax would be unconstitutional under the "equal protection of the laws" clause as applied to a foreign corporation which lawfully acquired a large amount of permanent and valuable property in this state prior to the imposition of the said tax of 1909 and under the preceding tax system, because the tax of 1909, as so applied, would impose a new and additional tax upon foreign corporations by a discriminating method which was not at the same time employed as to domestic corporations of the same kind carrying on a precisely similar business.

The discriminating method thus employed would consist—

(*a*) In doubling the amount of the tax.

32 (*b*) In repealing the right theretofore enjoyed by foreign corporations to deduct from their excise taxes the amount paid by them for local property taxes; whereas at the same time no changes were made in the tax system governing similar domestic corporations, which still retained the right to deduct from their excise taxes the amount of local property taxes paid by them.

20. The said tax is also unequal and unconstitutional, under the "equal protection of the laws" clause, because its charges, without discrimination, the same rates for the local privilege without regard to whether the company's local business amounts to 1 per cent or 99 per cent of its total sales or commerce here transacted, and because, further, the provision for a maximum of $2,000 unfairly and unequally discriminates against the smaller corporations,—the corporation with $10,000,000 capital paying precisely the same as that with $100,000,000 capital.

21. If, as in the case of the Lanston Monotype Machine Company, all sales of machines negotiated here are for delivery to the purchaser from a factory or warehouse located in another state, and where a small stock of repair parts is kept on hand in this state strictly for emergency uses and for the sole purpose of replacing broken parts of machines previously sold and delivered by the company in Massachusetts through the channels of interstate commerce, sales made in Massachusetts for delivery of repair parts from such stock are a mere incident to the company's interstate commerce, and a tax for the privilege of transacting such local sales would be unconstitutional if applied to such a company.

22. The mere maintenance here of a stock of samples by a company otherwise engaged here exclusively in making interstate sales or deliveries does not render such a company constitutionably taxable under said excise tax, even though occasionally, but not in the regular course of business, the samples themselves may be sold or deliveries made therefrom.

23. If the voluntary abandonment of a local stock of emergency repair parts would necessarily affect the ability of the company to make interstate sales of its machines or products in this state, or the amount of such interstate sales, a tax for the privilege of making local sales of repair parts constitutes a direct and substantial burden upon the company's interstate commerce, and the tax would be unconstitutional if applied to such a company.

24. If the entire business transacted by the petitioner within the limits of this state consists of sales or deliveries of goods contemplating or requiring transportation from one state into another, or of managing, directing, or superintending such sales or deliveries, then its business within this state is exclusively interstate com-
33 merce and within the protection of the "commerce" clause against an excise tax of this description.

The office or place of business where such sales or deliveries are transacted, superintended, directed, or managed, or where books or records covering the same are kept, or where the receipts therefrom are collected, deposited, or distributed, constitutes an instrumentality of interstate commerce within the protection of the "commerce" clause.

This excise tax cannot, therefore, constitutionally be imposed for the privilege of maintaining an office or place of business in this state for the purpose of transacting, managing, or directing such business, provided that no local or domestic sales or deliveries or other business are here carried on or superintended.

This applies equally to offices where commercial travelers have their headquarters, to bookkeeping, treasurer's and president's offices, and to offices where directors hold meetings for the purpose of directing such business.

25. Management, by means of directors' meetings and votes, does not constitute the transaction of "business" in any proper sense; but, if so, cannot constitute local or domestic business in this state, where the company's selling or delivery business is wholly interstate in character, and its entire property is located outside of this state, and its directors' votes have no reference to Massachusetts transactions or property.

26. If a foreign corporation has a Massachusetts office used mainly for the purposes of interstate commerce, and in no way used for domestic commerce, such a company cannot constitutionally, under the "commerce" clause, be subjected to this tax, because it incidentally also uses such office for the purpose of communicating with its agents or managing or directing its property located outside of this state.

27. If, as in the Locomobile Company of America case, it receives, as a part of the consideration for sales of new machines for delivery in this state from another state, old second-hand machines, and if its sales here made are confined to the resale of these second-hand machines; and if, further, the abandonment of the privilege of reselling second-hand machines would necessarily affect seriously the amount of sales made by the company for delivery from another state into this state, then the said excise tax does not apply to such a company; and, if so applied, would be unconstitutional under the federal Constitution.

28. Although a tax otherwise lawful may, in some instances, be measured by capital or gross receipts, the Massachusetts ex-
34 cise uses an unlawful and unconstitutional measure, because, being measured by the entire capital stock, it necessarily affects directly and substantially that part of the capital employed in interstate commerce or outside of this state.

29. Where, as in the Lanston Monotype Machine Company case, the entire profits of the local business do not suffice to pay the tax, it must necessarily be paid by the interstate portion of the company's business, which, to that extent, would be directly and substantially burdened.

30. Mere ownership for permanent investment by a foreign holding company of shares in foreign corporations, and the receipt and distribution of dividends on such shares, does not constitute the transaction of "business;" nor is an office maintained by such company, where directors' meetings are occasionally held, an "usual place of business."

CHENEY BROTHERS COMPANY, *Petitioner*,
And the Other Several Petitioners in the Consolidated Cause,

By Their Solicitors and Counsel,
CHARLES A. SNOW.
WM. P. EVERTS.

Filed February 28, 1914.

35 [Endorsed:] No. —. Eq. Cheney Brothers Co. v. Commonwealth of Massachusetts [and Other Causes Consolidated therewith]. Report, &c. Suffolk County.

36 And afterwards, to wit, on the seventh day of October, A. D. Nineteen Hundred and Fourteen, it was ordered by our said Supreme Judicial Court for the Commonwealth, as follows, viz.,

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, Oct. 7, 1914.

(#19803.)

In the Case of—

CHENEY BROTHERS COMPANY
vs.
COMMONWEALTH.

Pending in the Supreme Judicial Court for the County of Suffolk.

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,
Petition dismissed with costs.

BY THE COURT.

C. H. COOPER, *Clerk.*

October 7, 1914.

Brief Statement of the Grounds and Reasons of the Decision.

The reasons are set forth at length in the opinion filed herewith to which reference is made.
(Rescripts in the same form as the aforesaid rescript in the case of Cheney Brothers Company vs. Commonwealth of Massachusetts have been entered in the other cases consolidated with said case.)

37 And said Rescript was entered by our said Court, accordingly, whereupon the parties appeared and further hearing being had upon the Rescript the following Final Decree was entered by our said Court; viz.,

COMMONWEALTH OF MASSACHUSETTS,
Suffolk County:

Supreme Judicial Court. In Equity.

No. 19803. Eq.

CHENEY BROTHERS COMPANY, Petitioner,
v.
COMMONWEALTH OF MASSACHUSETTS, Respondent.

No. 20519. Eq.

LANSTON MONOTYPE MACHINE COMPANY, Petitioner,
v.
SAME, Respondent.

No. 18927. Eq.

LOCOMOBILE COMPANY OF AMERICA, Petitioner,
v.
SAME, Respondent.

No. 19896. Eq.

NORTHWESTERN CONSOLIDATED MILLING COMPANY, Petitioner,
v.
SAME, Respondent.

No. 19897. Eq.

COPPER RANGE COMPANY, Petitioner,
v.
SAME, Respondent.

No. 19784. Eq.

THE WHITE COMPANY, Petitioner,
v.
SAME, Respondent.

38 No. 19408. Eq.

CHAMPION COPPER COMPANY, Petitioner,
v.
SAME, Respondent.

No. 19906. Eq.

POCAHONTAS FUEL COMPANY, Petitioner,
v.
SAME, Respondent.

Final Decree.

The above consolidated cause came on to be further heard at this sitting after rescript from the Full Court, and thereupon, upon con-

sideration thereof, it is ordered, adjudged and decreed that the petitions of each and all of the above named petitioners in said consolidated cause, except that of the Pocahontas Fuel Company, be and they are hereby dismissed with one bill of costs to the respondent taxed in the sum of 42 50/100 Dollars, and upon the above entitled petition of the Pocahontas Fuel Company it is ordered, adjudged and decreed that the foreign corporation excise tax of $200 paid by said last named company to the Commonwealth on April 12th, 1913, was illegally assessed upon and exacted from the said company and that the said sum of $200 be repaid forthwith by the respondent to said company with interest from the date of such payment and with costs taxed in the sum of 144 08/100 Dollars.

BY THE COURT.

JOHN H. FLYNN,
Ass't Clerk.

Oct. 20, 1914.

39 All and singular which premises we have held good, by the tenor of these presents, to be exemplified.

In testimony whereof we have hereunto caused the seal of said Court to be hereto affixed.

Witness, Arthur P. Rugg, Esquire, Chief Justice of our said Supreme Judicial Court at Boston in said County, on this thirtieth day of November, in the year of our Lord one thousand nine hundred and fourteen.

[SEAL.] JOHN F. CRONIN, *Clerk.*

39½ COMMONWEALTH OF MASSACHUSETTS:

BOSTON, December 8, 1914.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Cheney Brothers Company vs. Commonwealth, which is entitled in 218 Mass. 558 Marconi Wireless Telegraph Co. vs. Commonwealth & eight other cases, decided on the 7th day of October, 1914.

HENRY WALTON SWIFT,
Reporter of Decisions.

40 RUGG, *C. J.*:

These are petitions brought by corporations organized under the laws of other States to recover excise taxes paid by each for the privilege of transacting business within the Commonwealth.

1. The foreign corporaton tax law, St. 1909, c. 490, Part III, ss. 56, et seq., has been upheld as a constitutional exercise of the power of the State after extended argument and thorough deliberation. Attorney General v. Electric Storage Battery Co. 188 Mass. 239. Baltic Mining Co. v. Commonwealth, 207 Mass. 381. Keystone Watch Case Co. v. Commonwealth, 212 Mass. 50. S. S. White Dental Manuf. Co. v. Commonwealth, 212 Mass. 35. On writ of error the judgments in the last two cases were affirmed in 231 U. S. 68. The

only question to be determined in the cases at bar is whether under the principles already established the several plaintiffs were subject to the excise laid upon each. The tax sought to be recovered is strictly an excise tax and in no sense a property tax. It is a license fee exacted from foreign corporations for the privilege of
41 doing in this State business other than interstate commerce. So far as any of the plaintiffs' requests for rulings seek for a re-examination or reversal of the principles established in these decisions, they rightly were denied.

2. The Commonwealth urges that each of the plaintiffs is estopped now from denying that it is within the scope and purview of this law. The ground for this contention is that each seasonably, voluntarily and without protest filed with the secretary of the Commonwealth the certificate of its condition as a foreign corporation required by s. 54, and likewise appointed the commissioner of corporations its agent for the service of process in accordance with St. 1903, c. 437, s. 58, and hence has acknowledged itself to be subject to the law. The principle invoked is that, where one of his own volition asks for a privilege or license, he cannot be heard to say afterward that his payment of the fee exacted was illegal and on that account seek to recover it. It relies upon Cook v. Boston, 9 Allen, 393, 394, Emery v. Lowell, 127 Mass. 138, 141, and like cases, and especially upon Ficklen v. Shelby County Taxing District, 145 U. S. 1, 24. But all these were cases where a fee was exacted in advance for a license issued for the transaction of a particular branch of business. In the Ficklen case the precise point decided was that a resident commission broker, who, after paying the required fee, had taken out a general license to do all kinds of commission brokerage for both foreign and domestic correspondents for 1887 and also had given a bond to pay in addition a percentage on all sales
42 during that year, could not resort to the courts to compel the issuance to him of a license for the ensuing year by municipal authorities who refused because he had not complied with the bond of the earlier year on the ground that as the event had proved business had been done only for non-resident principals. The cases at bar in this respect come within the principle applied to a somewhat similar state of facts in Atchison, Topeka & Santa Fe Railway v. O'Connor, 223 U. S. 280, where it was held that a foreign corporation paying an excise tax was not acting voluntarily in a legal sense but was under implied duress when it was put to a serious disadvantage against the sovereignty by reason of liability to heavy penalties if in the end its contention for exemption should not be sustained. Severe penalties are provided by s. 73 for each day's delay in filing returns, and by s. 74 the business of the corporation may be enjoined, while by St. 1903, c. 437, s. 60, the delinquent corporation is denied the privilege of maintaining actions in our courts. Somewhat summary remedies are given in the event of a failure to pay the tax. See St. 1909, c. 490, Part III, ss. 58, 62, 69. The provision of s. 70 under which these petitions are brought is that relief may be had by any corporation within six months after paying the tax, which shall be the exclusive remedy. It does not require any

preliminary protest or statement of objection before filing the petition. From all these considerations the conclusion follows that the several petitioners are not prevented from maintaining these petitions because they complied with the requirements of the law as its scope was contended to be by the officers of the Common-
43 wealth, in order to avoid the consequences of being mistaken in their own interpretation of it. The provisions of St. 1903, c. 437, ss. 58, 60, may apply in whole or in part to corporations engaged exclusively in interstate commerce. International Harvester Co. v. Kentucky, 234 U. S. 579. But that question is not now before us and does not affect the point here decided.

3. It was said in the course of the opinion in Attorney General v. Electric Storage Battery Co. 188 Mass. 239, at pages 240, 241, "If the statute before us applied to the maintenance of a place of business solely for the purpose of engaging in interstate commerce it would be unconstitutional. * * * We are of opinion that the Legislature cannot have intended to include in this statute corporations whose usual place of business is established and maintained solely for use in interstate commerce." After that decision St. 1909, c. 490 was enacted without material change in this respect, from which the inference flows that the Legislature was content with the law as interpreted by that decision. In Baltic Mining Co. v. Commonwealth, 207 Mass. 381, at page 390 it was said, referring to the case last cited, "In our former adjudication upon it [the statute now under consideration] we expressed the opinion that it was inapplicable to cases where a foreign corporation had its place of business here only for use in interstate commerce. It is not to be inferred that the Legislature intended the statute to go beyond the constitutional authority of the Commonwealth." What was said in these two decisions was adverted to and apparently adopted in part as the basis of decision in Baltic Mining Co. v. Massachusetts, 231 U. S. 68, where it was stated at page 84, "and the statute,
44 it is held, does not apply to corporations which have places of business for the transaction solely of interstate commerce." See also S. S. White Dental Manuf. Co. v. Commonwealth, 212 Mass. 35, at page 46.

The contention of the Commonwealth that these sentences were not intended to apply to and do not apply to corporations doing a commercial or trading business, but only to transportation corporations, cannot be supported. The decisions in which they occur did not relate to transportation corporations but to purely business corporations. The statements cannot be treated as dicta, for they are used as essential links in a chain of reasoning by this court upholding the constitutionality of the statute. We regard ourselves as bound by them in interpreting and applying this statute.

The Attorney General has argued in substance that the maintenance of a local office solely for a purpose connected with interstate commerce is such a doing business within the State as subjects a corporation to the license fee required by this statute. Reliance in this regard is placed especially upon the words in Pembina Mining Co. v. Pennsylvania, 125 U. S. 181, at page 184, to the

effect that the State has a right to exact a license fee of a foreign corporation for maintaining "an office in the Commonwealth for the use of its officers, stockholders, agents, or employees." But as was explained in McCall v. California, 136 U. S. 104, at page 112, that decision was not intended to impinge upon the equally well settled principle that "the only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where
45 the corporation is in the employ of the federal government, or when its business is strictly commerce, interstate or foreign. The control of such commerce, being in the federal government, is not to be restricted by State authority." Expressions to be found in Horn Silver Mining Co. v. New York, 143 U. S. 305, 317, Wolff Dryer Co. v. Bigler & Co. 192 Penn. St. 466, Davis & Rankin Building & Manuf. Co. v. Dix, 64 Fed. Rep. 406, 413 and Attorney General v. Bay State Mining Co. 99 Mass. 148, 153, relied on by the Attorney General, must be regarded as subject to this limitation. In principle that question is concluded by Norfolk & Western Railroad v. Pennsylvania, 136 U. S. 114, and McCall v. California, 136 U. S. 104, when read in the light of the numerous definitions (presently to be examined) of commerce between the States given by that court. Such a place of business in common with all others, whether of citizens or aliens, perhaps might be required to pay a license fee, but that question is not presented. The conclusion is that the maintenance by a foreign corporation of a local office solely for use in interstate commerce does not render it liable to the excise tax of the statute under consideration.

4. What constitutes "commerce * * * among the several States" within the meaning of those words in the Federal Constitution has been defined by the Supreme Court of the United States. Said Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. 1, 189, 190, "Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches." In County of Mobile v. Kimball, 102 U. S. 691, at page 702 occurs this definition: "Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in
46 these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." In Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 203, it was said, "Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions." In Robbins v. Shelby County Taxing District, 120 U. S. 489, at page

497, it was said that "the negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce." Kidd v. Pearson, 128 U. S. 1, 20. Lottery Case, 188 U. S. 321, 352, 353. Swift & Co. v. United States, 196 U. S. 375. Diamond Match Co. v. Ontonagon, 188 U. S. 82. It is apparent from this review of decisions that the interstate commerce regulation which is under the exclusive control of Congress and which cannot be affected by any discriminatory State law, includes not merely transportation but the other inherently necessary incidents of purchase and sale of goods. Nor is it of decisive consequence in this connection where the contract is made or where the title passes. As was said in Dozier v. Alabama, 218 U. S. 124, at page 128, "But as was hinted in Rearick v. Pennsylvania, 203 U. S. 507, 512, what is commerce among the States is a question depending upon broader considerations
47 than the existence of a technically binding contract, or the time and place where the title passed." Caldwell v. North Carolina, 187 U. S. 622. Savage v. Jones, 225 U. S. 501, 520. Crenshaw v. Arkansas, 227 U. S. 389. Rogers v. Arkansas, 227 U. S. 401. Stewart v. Michigan, 232 U. S. 665.

5. The petitioners have emphasized somewhat in argument the phrase in 231 U. S. at page 86, to the effect "that local and domestic business for the privilege of doing which the State has imposed a tax, is real and substantial," and have sought to infer therefrom that a new limitation has been imposed upon the power of the States. This conclusion does not follow. The sentence probably was intended only as a reference to a fact which existed in the cases then before the court, although not one decisive in any respect as to the conclusion reached. But given its full force, it is nothing more than a statement that a shadow cannot be made the basis of an excise tax. But when the local and domestic business exists, then an excise may be levied. There is nothing to indicate that a comparison between the total business of the company and its local business was intended. Such a basis has never before been intimated. It is directly contrary to Ficklen v. Shelby County Taxing District, 145 U. S. 1. See also Flint v. Stone Tracy Co. 220 U. S. 107. If such a principle exists in reference to any facts, it has no relation to any of the cases at bar. The test is whether the foreign corporation transacts domestic business substantial in its essence and not by comparison, and reasonably susceptible of separation from its interstate commerce. If it does, the State can fix its own terms so far as license fee is concerned.

48 6. The ratio of profits on the domestic business to the license tax is an immaterial circumstance. If the license fee imposed is general in its operation and is in other respects invulnerable, the mere fact, that some foreign corporation may not be able to make profits enough to meet it, does not render the law unconstitutional as to that corporation. The opportunity to do business subject to the protection of our laws and with all the advantages which arise from our markets and our financial and other resources, is the thing which is made the subject of the excise. United States

v. Singer, 15 Wall. 111. Flint v. Stone Tracy Co. 220 U. S. 107, 166, 167.

Both upon this point and the one last discussed the petitioners rely on the statement in United States Express Co. v. Minnesota, 223 U. S. 335, 348, to the effect that if the amount of the tax is "unduly great, having reference to the real value" of the property engaged in the business, and on that in Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 42, referring to a tax "not at all disproportioned to such local business." See S. S. White Dental Manuf. Co. v. Commonwealth, 212 Mass. 35, 44. These tests well may be used as aids in determining whether the general scheme of an excise statute is an honest attempt to raise legitimate revenue, or whether it is "a mere device to reach and burden the interstate commerce of the company." But when the general scheme of the statute has been upheld as not out of harmony with the Federal Constitution, then it cannot be stricken down because in a particular instance the excise may seem large. New York v. Roberts, 171 U. S. 658, 661, 663. Pullman Co. v. Kansas, 216 U. S. 56, 66, 67. Ohio Tax Cases, 232 U. S. 576, 592.

49 It remains to consider the several cases at bar in the light of these governing principles.

7. The Marconi Wireless Telegraph Company of America is organized under the laws of New Jersey. It maintains in Massachusetts near the ocean three wireless stations, each consisting chiefly of a high pole having at the top a wire or wires with bare ends, from which are sent through and taken from the air currents of electricity, whereby messages are transmitted and received. Connected with this apparatus are rooms similar to ordinary telegraph stations, for use of the wireless telegraph operators. At each station it transmits and receives wireless messages for hire to and from ships on the high seas and foreign countries. It neither transmits nor receives any messages whatever over land or in or through this Commonwealth. It has no property in the Commonwealth, except that above described. It is plain that this petitioner is engaged exclusively in foreign commerce. Transmission of intelligence by means of the electric telegraph has been held to be commerce. Pensacola Telegraph Co. v. Western Union Telegraph Co. 96 U. S. 1. Telegraph Co. v. Texas, 105 U. S. 460. Leloup v. Port of Mobile, 127 U. S. 640, 645. Western Union Telegraph Co. v. Kansas, 216 U. S. 1. The sending of the means of education by correspondence through the mails also is commerce. International Text Book Co. v. Pigg, 217 U. S. 91. The same principle governs the transmission of ideas, thought and news by the recently discovered instrumentality which has harnessed in its service "the sightless couriers of the air" to perform between its stations without visible highway the func-

50 tions previously executed by electricity only when confined to wire as a conducting medium. This petitioner transacts no business of a domestic or local nature, except such as is inseparable from and necessarily incidental to its foreign commerce. Hence it is not within the purview of the statute.

8. The Pocahontas Fuel Company is established under the laws

of West Virginia. Its business is the buying and selling of coal and coke. At its office in Boston is a manager who has charge of New England business and who is paid by check from New York, a salesman and a stenographer. Records of sales are kept at the Boston office and an average deposit of $1,000 is kept in a local bank for the expenses of this office. Correspondence and telephoning respecting sales is done from this office. Customers do not come to the office, but are called upon by the salesman, who sends all orders to New York, where they must be accepted and approved before the sale takes place. Goods are shipped to customers f. o. b. Norfolk, Virginia. The local office, in making contracts for delivery in Massachusetts, arranges charter parties for boats in the customer's name. All payments by customers are made by remittances by check to New York. This company has none of its goods or property in the Commonwealth, except office furniture, and there is no treasurer here. The description of business done at the Boston office, as shown by the agreed facts, is somewhat meagre, but it does not appear to include anything more than interstate commerce. No stock of goods is kept here. There is no local shop or store as a general resort for customers and the conduct of the essential details of trade. It does not manufacture nor mine but buys its stock from other companies and, although not distinctly stated, it may be inferred that such purchases do not occur in Massachusetts. Its busi-
51 ness, so far as this Commonwealth is concerned, consists of selling by contracts made in New York coal bought in other States to customers in the New England States and arranging for its transportation to them over the high seas or by rail from Virginia, solely through the medium of a manager and a salesman who travel to see prospective purchasers or communicate with them by telephone or letter from its Boston office. That which this company does in Massachusetts seems to be rationally connected with interstate commerce. The sole business which this company appears to carry on is "commerce * * * among the several States" as that phrase has been defined in judgments by which we are bound. The keeping of an office and a local bank account and the employment of a stenographer are incidental instrumentalities reasonably necessary to the conduct of this interstate commerce, and hence inseparable from it. This is not a case where the corporation by the form of its contracts or the details adopted for the doing of its business has attempted to convert into a form resembling interstate commerce that which in its intrinsic substance is local business subject to State control. Hence, Browning v. Waycross, 233 U. S. 16, where that thing was essayed, is not in point. This case seems to be covered in principle by McCall v. California, 136 U. S. 104; Norfolk & Western Railroad v. Pennsylvania, 136 U. S. 114; Crenshaw v. Arkansas, 227 U. S. 389; Rogers v. Arkansas, 227 U. S. 401; Stewart v. Michigan, 232 U. S. 665; Singer Sewing Machine Co. v. Brickell, 233 U. S. 304. It follows that it is entitled to prevail in this proceeding.

9. The Cheney Brothers Company is organized under the laws of Connecticut for the manufacture of silk and other fabrics and for

the purpose of trade. It maintains in Boston an office and
52 salesroom with one office salesman and four other salesmen who travel through New England. No bookkeeper is employed, no books are kept except copies and records of orders, and no collections are made. The only deposit of funds is for the expenses of the office, amounting usually to about $250, which is sent from the treasury in New York. The salaries of salesmen and rent of office are paid directly from the Connecticut office. A stock of samples is kept, but no other goods. The salesmen take orders, which are subject to approval by the home office in Connecticut, and the goods are shipped directly from Connecticut to the customer. The contract of sale is completed in Connecticut where the title passes. This description of the place maintained by the corporation in Boston, and the character of business transacted there shows something outside interstate commerce. A fixed abode has been established, which is used as the headquarters for its New England business. It is almost a necessary inference from the maintenance of an "office and salesroom" with one permanent salesman, that customers resort thither in considerable numbers for the purpose of examining samples and placing orders. It reasonably may be assumed that here also are fixed all the terms of a very substantial number of sales, and that the only thing required to complete the transaction is the bald approval by the company at its home office. It is not only a permanent home for the corporation for the carrying on of its New England sales business, but it has many of the characteristics of a local salesroom. The stock of samples kept on hand is large enough apparently to require the constant attendance of one salesman. It was said by Mr. Chief Justice Waite in Robbins v. Shelby County Taxing District, 120 U. S. 489, at page
53 500, "I cannot believe that if Robbins had opened an office for his business within the Taxing District, at which he kept and exhibited his samples, it would be held that he would not be liable to the tax, and this whether he stayed there all the time or came only at intervals." These words were used in a dissenting opinion. But they embody a thought by way of hypothesis which evidently was regarded as too plain to be challenged.

Five salesmen are attached to these Massachusetts headquarters; one stationed there permanently; while four others also travel throughout New England. New England is a perfectly well understood geographical term which includes Connecticut, the domiciliary State of the corporation. Since the agreed facts show that the travelling salesmen attached to the Boston office "cover" Connecticut as well as the other New England States, it follows that this local domicil is used in part at least for the transaction of business between the Cheney Brothers Company, domiciled in Connecticut, and other residents of Connecticut. Apparently the orders from residents of Connecticut are registered, copied and forwarded to the Connecticut office of the corporation through the Boston office. Such orders may be taken by the travelling salesmen from purchasers in Connecticut or at the salesroom directly from Connecticut customers who go there in person. Plainly, the sale and delivery of goods by

a Connecticut corporation to a citizen of Connecticut does not become interstate commerce merely because the order may have been transmitted through a sales agency of the corporation located in Massachusetts. This especially is true where the sale is consummated in Connecticut by acceptance of the order and the passing of the title in Connecticut, as is said in the agreed facts to be the course of business. Lehigh Valley Railroad v. Pennsylvania, 145
54 U. S. 192. United States Express Co. v. Minnesota, 223 U. S. 335, 341. That there is nothing inconsistent with this conclusion in Hanley v. Kansas City Southern Railroad, 187 U. S. 617, is established by Ewing v. Leavenworth, 226 U. S. 464.

Some of these circumstances singly are enough to show that the place maintained by Cheney Brothers Company in Boston was not used exclusively for interstate commerce. Combined together, they lead to the conclusion that it is not entitled to prevail in this proceeding. The recognition of the existence of the corporation in Massachusetts to the extent here shown, by permitting it to maintain an office for the general use of its employees, agents and customers and the storage and display of samples of its products, "was a matter dependent on the will of the State," who could affix to the favorable exercise of its volition the conditions set forth in the corporation excise tax law. Pembina Mining Co. v. Pennsylvania, 125 U. S. 181, 186. New York v. Roberts, 171 U. S. 658. Reymann Brewing Co. v. Brister, 179 U. S. 445. Horn Silver Mining Co. v. New York, 143 U. S. 305. Attorney General v. Bay State Mining Co. 99 Mass. 148. The record reveals nothing to bring this corporation within any of the exceptions to this general rule discussed in McCall v. California, 136 U. S. 104, Norfolk & Western Railroad v. Pennsylvania, 136 U. S. 114 and kindred cases.

10. The Lanston Monotype Machine Company, organized under the laws of Virginia, manufactures machinery at its factory in Philadelphia, Pennsylvania. It maintains an office in Boston, where there are a manager and office manager and four inspectors all of whom act as salesmen. The machines are all sold on orders
55 subject to cancellation within seven days sent to the home office in Philadelphia and accepted there before becoming operative, and thence the machines are shipped directly to the purchasers, with a bill of lading delivered by the local bank to the purchaser when he makes his initial payment. Stock to replace and to repair broken parts of the machines is kept constantly on hand at the Boston office and is replenished weekly from Philadelphia. From this stock in Boston parts are supplied by direct sale for about half the repairs made on the company's machines in New England, amounting to about $12,000 per year. The keeping and sale of this stock in Boston is an inducement to the trade to buy these machines. The petitioner's competitors keep no such stock of parts. These facts show the transaction of a very considerable local or intrastate business as distinguished from its interstate commerce. While there may be economies of management or advertising advantages arising from it in conjunction with the interstate business of the company, there is no necessary or inherent connection between

the two. Because the interstate commerce may not be profitable except in connection with local business does not so interlock the two that they are inseparable. The protection afforded by the Federal Constitution to interstate commerce against State excise taxation does not go to the extent of permitting one engaged in interstate commerce to compete in local business free from liability to an excise to the State merely for the sake of greater profit, or even of making the difference between profit and loss in the business as a whole. Plainly this local business of replacing broken parts is conducted in a manner wholly distinct from the interstate business. The distinction is not whether a profit is made by the conjoining and a loss suffered by separating the intrastate and the interstate commerce, but whether the nature of the business is such that the company is free to renounce the domestic business if it chooses and still conduct its interstate commerce. That which was said in Baltic Mining Co. v. Massachusetts, 231 U. S. 68, at page 86, is aptly expressive of the situation disclosed on this petition, namely, "It is apparent" that the corporation "is carrying on a purely local and domestic business quite separate from its interstate transactions. That local and domestic business, for the privilege of doing which the State has imposed a tax, is real and substantial and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business." This case also is governed by Attorney General v. Electric Storage Battery Co. 188 Mass. 239, where the facts were nearly identical. It there was said by Knowlton, C. J., at page 241, "While the statute is inapplicable to any business or place which belongs entirely to interstate commerce, it is applicable to the defendant, a corporation engaged in interstate commerce, which has, at the same time, a place of business for other purposes. The principle has been recognized repeatedly by the Supreme Court of the United States in similar cases. Osborne v. Florida, 164 U. S. 650. Pullman Co. v. Adams, 189 U. S. 420." Singer Sewing Machine Co. v. Brickell, 233 U. S. 304.

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11. The Locomobile Company of America, a West Virginia corporation, is authorized to manufacture, buy, sell and deal in automobiles and to carry on general business. Its factory is in Bridgeport, Connecticut, where its business is the manufacture and sale of automobiles. In Boston it occupies an office, salesroom and repair shop for the purpose of repairing cars of its own make and second hand cars taken in exchange for its own make. It occupies a large building and employs thirty persons, ten of whom are in the sales and office department and twenty in the repair department. Its method of conducting its sales of new cars is for orders to be taken by its Boston agent and transmitted to Bridgeport, whence cars are shipped to the Boston agent, who makes deliveries in accordance with orders. It does not appear, moreover, that separation of an automobile for a particular purchaser is made until the car reaches Boston, although no shipments of cars are made into Massachusetts "except cars used in fulfilment of orders * * * previously given and approved." In two thirds of the sales of new cars the purchaser pays the entire price in cash on or

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before the delivery of the car, while in the remaining third "the company accepts, as a part of the consideration, a car of whatever make, previously used by the purchaser." The company maintains at its place of business in Boston a used-car department, where it sells cars of its own and other makes taken as part consideration in the sale of new cars. A stock of such cars is constantly kept for sale. The business of the used-car department for the year during which the excise in question was levied amounted to $41,000 out of a total business of $246,000 done by the company in Boston during the same period. The petitioner also keeps in its Boston repair shop a stock of repair parts used in repairing its own make of cars whether sold in Boston or elsewhere. The repair stock kept on hand amounts to $6,000 and the repairs made annually to $7,500. Testimony was offered to the effect that this was the usual course of business
58 of all automobile companies and that an abandonment of either the used-car business or the repair business would impair the sales of new cars. This narration of facts makes it plain that this petitioner is carrying on a very considerable local and domestic business quite separate and distinct from its interstate business. The petitioner contends that this domestic business is inseparable from its interstate commerce and hence that it is beyond the control of the statute. It was said in Pennsylvania Railroad v. Knight, 192 U. S. 21, at 28, that "Many things have more or less close relation to interstate commerce, which are not properly to be regarded as a part of it." The repair part of this company's business comes within the facts before the court in Attorney General v. Electric Storage Battery Co. 188 Mass. 239, and is concluded by that decision. Moreover, the sale of second hand automobiles is a business by itself. In effect the taking of a second hand machine as part payment for a new one is an investment of part of the proceeds of the sale of the new car. The keeping of these cars in stock and making sales from them is a domestic business and is not interstate commerce nor inseparably connected with it. There is ground for the argument that the transactions as to the new automobiles being shipped to its agent in Boston and separated and delivered to the several purchasers there and paid for there do not constitute interstate commerce, but sales from a local stock replenished by shipments. Apparently there is or may be no apportionment of any particular automobile until it is made by the agent in Boston, for the order may not identify a specific machine. See Caldwell v. North Carolina, 187 U. S. 622. But it is not necessary to
59 discuss nor decide this point for the other branches of this company's business which have been described are domestic and separate from this if it be assumed to be interstate. This case comes plainly within the principles established in S. S. White Dental Manuf. Co. v. Commonwealth, 212 Mass. 35; S. C. 231 U. S. 68.

12. The Northwestern Consolidated Milling Company is a corporation organized under the laws of Minnesota. It is authorized by its charter among other things to manufacture and sell flour. Its mills are located in Minnesota. It maintains a Boston office which has charge of the business of the company in New England and a

part of New York. Sixteen travelling salesmen are connected with the office, seven of whom are devoted to the Massachusetts trade. These salesmen take orders for flour and other grain products from retailers. These orders are turned over to the nearest wholesale dealer, and the petitioner has nothing further to do with him. The situation is that the salesmen in the employ of the manufacturer are soliciting business for the wholesaler by whom they are not employed. The wholesaler fills from his stock the orders given by the retailer through these salesmen and the retailer pays him. These transactions are wholly between the domestic wholesaler and the domestic retailer. The wholesalers buy their stock from the petitioner by order to the Boston office. Such orders are sent to the petitioner in Buffalo or Minneapolis, and the goods are shipped to the wholesaler. In no case is there any approval of orders by the home office. One half of the sales from the Boston office are for delivery in Massachusetts. The petitioner keeps on hand in
60 Boston a small stock from which it makes sales for delivery in Massachusetts. The major part of the petitioner's business in furnishing salesmen to act as agents for the domestic wholesalers in soliciting orders from domestic retailers. This is in substance the business of providing agents for the wholesalers. The business done by the wholesaler and the retailer is a domestic business. The business of the petitioner is chiefly in aid of this domestic business, and partakes in no respect of interstate commerce. The motive which influences the petitioner in undertaking this business is inconsequential in determining whether it constitutes interstate commerce. The fact that a natural result may be to increase the sales of the petitioner to the wholesalers is an immaterial circumstance. It is too remote from the actual business of the petitioner's salesmen to make that interstate commerce. Its sales of goods directly from local stock is also domestic, and not interstate in character. There is strong ground for the argument that this company also might be subject to the excise because the orders from wholesalers are received and accepted, and the transaction in substance consummated at the Boston office. But it is not necessary to pass upon this point, because the manifestly domestic business of the petitioner of very considerable proportions renders it subject to the excise tax.

In none of the cases considered under paragraphs 9 to 12 both inclusive of this opinion is the intrastate business more intimately connected with interstate commerce than in Allen v. Pullman's Palace Car Co. 191 U. S. 171; Pullman Co. v. Adams, 189 U. S. 420; Osborne v. Florida, 164 U. S. 650; Pennsylvania Rail-
61 road v. Knight, 192 U. S. 21; Browning v. Waycross, 233 U. S. 16, in each of which it was held that the two were separable for purposes of a state excise on the domestic business.

13. The Copper Range Company is organized under the laws of Michigan. Its articles of association state that "the place where the business office of this corporation is located, without the limits of the State of Michigan, is Boston, Massachusetts." This petitioner is a "holding company" whose chief asset is stock in a foreign copper mining corporation, and it also holds the stock and bonds

of a Michigan railroad and certain mineral lands. It transacts no commerce either here or elsewhere. Its activities in Massachusetts consisted in receiving monthly dividends from its stock in foreign corporations and depositing them in Boston banks, and the payment of these receipts, less officers' salaries and expenses, to its stockholders by way of dividends. Substantially its entire capital stock is owned by the Copper Range Consolidated Company, whose treasurer is also the treasurer of the petitioner. Its directors' meetings are held three or four times a year in Boston, and its annual stockholders' meeting is also held there. It declares and pays dividends several times annually. The president and treasurer are residents of Massachusetts, and it keeps its corporate records and financial books of account here. It does not appear expressly, but it fairly is inferable from the fact that its treasurer's office is here and its accounts are kept here, that its assets also are kept here. The only question involved in this case is whether the petitioner is doing business in this Commonwealth. Apparently the main business of the corporation is conducted in Massachusetts. A holding com-
62 pany commonly has no business except the holding of its directors' and stockholders' meetings, the receipt of dividends and other income, the payment of its salaries and clerical and office expenses and the distribution of its profits among its stockholders. All of these functions are transacted in Massachusetts. It is significant of the view which the petitioner's incorporators had of its relation to Boston that they stated in their articles of association that its business office outside of Michigan was at Boston. It hardly could be contended that this was not a business corporation. It belongs to no other class of corporations known to the law. The performance of these functions in this Commonwealth constituted a doing of business within the Commonwealth. McCoach v. Minehill & Schuylkill Haven Railroad, 228 U. S. 295, manifestly is distinguishable. The place where these activities are carried on properly may be termed a usual place of business. Although the legal domicil of the petitioner is in Michigan, its substantial home appears to be in this State, where its essential corporate faculties are exercised. The exaction of a license fee for the transaction of these corporate functions is within the power of the State. Pullman Co. v. Adams, 189 U. S. 420, 422. Baltic Mining Co. v. Massachusetts, 231 U. S. 68.

14. The Champion Copper Company is organized under the laws of Michigan, to mine, smelt and refine copper and other minerals, and to sell the same. Its articles of association state that the "place where the business office of this corporation is located, without the limits of the State of Michigan, is Boston, Massachusetts." It owns a copper mine in Michigan, where its copper is mined. Its product is sold exclusively through a selling agent in New York which
63 represents the petitioner only with respect to making the contracts of sale and the collections from purchasers and remitting the proceeds to the treasurer of the petitioner. Deliveries under contracts of sale are exclusively under the direction of the petitioner's treasurer. The petitioner maintains its treasurer's office in Boston for the purpose of general direction of the deliveries of copper

in accordance with contracts made by its sales agent, and for the purpose of informing its sales agent as to amounts of copper to be sold and the prices, and for the necessary bookkeeping in connection with sales and deliveries, and for the deposit of funds received from all sources in Boston and other banks, the payment of its office expenses and salaries of its officers, and the distribution of dividends among its stockholders. The president and treasurer have their offices in Boston, and five of its seven directors reside in Massachusetts, where also directors' meetings are held during the year. At such meetings reports are submitted and dividends declared and votes passed authorizing the execution of deeds, conveying rights of way and other easements in land in Michigan. The company's mine in Michigan is by vote of its board of directors under the exclusive management of a general manager resident in Michigan. But the general management and control of all the business and property of the petitioner is vested in its directors. This summary of the transactions of the petitioner in Boston shows that it is transacting business there which is not interstate commerce. The articles of association manifest a purpose to maintain a business office in Boston. The functions performed by the president, treasurer
64 and directors are such as commonly are essential to the operation of a business corporation. A considerable portion of the business transacted in Boston relates to matters quite unrelated to interstate commerce. It may be an interesting question whether a foreign corporation can select any place attractive from financial, economic, or other reasons, and establish there the management of all its interstate commerce, and seek immunity from any license for this privilege under the commerce clause of the Federal Constitution, when there is no direct connection between such place and its interstate commerce. We do not understand that McCall v. California, 136 U. S. 104, and Norfolk & Western Railroad v. Pennsylvania, 136 U. S. 114, go to this extent. But it is not necessary to discuss this question nor to determine whether the exercise by the treasurer over the sales agent and the other instrumentalities of sale constitutes interstate commerce. Baltic Mining Co. v. Commonwealth, 207 Mass. 381, 387, United States v. E. C. Knight Co. 156 U. S. 1, because apart from these considerations the corporate activities conducted at Boston constitute a doing of business which has no direct relation to commerce. The entire corporate potentiality dwells in the Boston office. Its executive officers are there. The responsibility for its management as a corporation rests upon those whose headquarters are there. Respecting the effects of our excise law upon such a state of facts, the language of Pembina Mining Co. v. Pennsylvania, 125 U. S. 181, at page 184, is apposite: "It only exacts a license tax from the corporation when it has an office in the Commonwealth for the use of its officers, stockholders, agents, or employees. * * * The exaction of a license fee to enable the corporation to have an office for that purpose within the Commonwealth is clearly within the competency of its Legislature."
65 Baltic Mining Co. v. Massachusetts, 231 U. S., 68.

15. The White Company is an Ohio Corporation, organized

to manufacture and sell automobiles. Its manufactory is in Ohio. It admits that it has a real and substantial local and domestic business. Its petition raises no question under the commerce clause of the Federal Constitution, but it avers that it is denied the equal protection of the laws. Such protection is assured to it, by the Constitution both of this Commonwealth and of the United States. Its contention rests on these facts. After 1903 (when St. 1903, c. 437, s. 75, was in force) and before 1909 it acquired land in Boston, and built thereon a seven story building of steel, brick and concrete. It was especially adapted for use as a garage, and gasoline tanks, elevators and a turntable were installed, the total investment approximating $175,000. Adjoining property was acquired and remodelled and adapted for an automobile service station. This latter estate has not been occupied for several years, nor leased or sold, although it has been for lease or sale. The license fee exacted by the laws of the Commonwealth from foreign corporations has been made more onerous by the statute of 1909. The petitioner contends that these facts bring it within the principle established by Southern Railway v. Greene, 216 U. S. 400.

The real estate acquired by this petitioner is of a kind adapted to a very considerable and increasing business, in which there is general competition. The storage and care of automobiles and the performance of necessary service for their repair, maintenance and operation is a widespread business in which large amounts of capital are invested and considerable numbers of persons are en-
66 gaged. Such establishments are frequent subjects for lease and sale. There is nothing to indicate or to warrant the inference that the petitioner's investment in real estate is not readily salable at reasonable prices. It is not property of a nature irretrievably devoted to a limited and monopolistic use, and not readily available either for other valuable uses or to other persons ready to devote it to the same uses at prices fairly equivalent, subject to the general vicissitudes of business conditions, to the original investment. The Greene case related to railroad property, which is not susceptible of use for any other purpose without great loss. In that opinion it was said, "It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. * * * The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed." 216 U. S. at page 414, citing Ames v. Union Pacific Railroad, 64 Fed. Rep. 165, 177. In S. S. White Dental Manuf. Co. v. Massachusetts, 231 U. S. 68, at page 88, it was said respecting a similar contention: "The conditions existing in the Southern Railway Company v. Greene case are not presented here. * * * We do not find in this situation an acquisition of permanent property, such as was shown in the Greene case." The facts in the case at bar are indistinguishable from those before the court in that case. "Permanent property," as these words were used in the opinion in the White Dental Company case referring to the Greene case, we interpret to mean at least a kind of property, ownership of which is inherently necessary for the establishment of the business, which must abide in the same ownership, and which

cannot in the nature of things be sold in the general market
67 so as to yield a fair return for the cost, less its normal depreciation. At all events, the Greene case does not exonerate this petitioner from liability to the excise.

Moreover, there is nothing to indicate that the purchase of real estate and the construction of a building were indispensable features of its initial admission to do business here. It is common knowledge that business like that of the petitioner often is conducted on leased property. There is a wide difference between business of that sort and the operation of a railroad, which imperatively requires a roadbed and track.

The conclusion here reached seems to be supported also by Hammond Packing Co. v. Arkansas, 212 U. S. 322, Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246, and Waters-Pierce Oil Co. v. Texas, 177 U. S. 28.

What has been said disposes of all the cases. It is not necessary to follow in detail the numerous requests for rulings. So far as they apply to any of the cases, the material principles to which they call attention have been discussed. Let entries be made for judgment in the several cases as follows:

Marconi Wireless Telegraph Company of America v. Commonwealth;

Decree for the petitioner with costs.

Pocahontas Fuel Company v. Commonwealth;

Decree for the petitioner with costs.

Cheney Brothers Company v. Commonwealth;

Petition dismissed with costs.

Lanston Monotype Machine Company v. Commonwealth;

Petition dismissed with costs.

68 Locomobile Company of America v. Commonwealth;

Petition dismissed with costs.

Northwestern Consolidated Milling Company v. Commonwealth;

Petition dismissed with costs.

Copper Range Company v. Commonwealth;

Petition dismissed with costs.

Champion Copper Company v. Commonwealth;

Petition dismissed with costs.

White Company vs. Commonwealth;

Petition dismissed with costs.

[Endorsed:] Marconi Wireless Telegraph Co. vs. Commonwealth and eight other cases. Certified copy of the opinion of the Supreme Judicial Court.

69 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court. In Equity.

No. 19803. Eq.

CHENEY BROTHERS COMPANY (Original Petitioner), Plaintiff in Error,
v.
COMMONWEALTH OF MASSACHUSETTS (Original Respondent), Defendant in Error.

No. 20519. Eq.

LANSTON MONOTYPE MACHINE COMPANY (Plaintiff in Error)
v.
SAME.

No. 18927. Eq.

LOCOMOBILE COMPANY OF AMERICA, Plaintiff in Error,
v.
SAME.

No. 19896. Eq.

NORTHWESTERN CONSOLIDATED MILLING COMPANY, Plaintiff in Error,
v.
SAME.

No. 19897. Eq.

COPPER RANGE COMPANY, Plaintiff in Error,
v.
SAME.

No. 19784. Eq.

THE WHITE COMPANY, Plaintiff in Error,
v.
SAME.

No. 19408. Eq.

CHAMPION COPPER COMPANY, Plaintiff in Error,
v.
SAME.

No. 19906. Eq.

POCAHONTAS FUEL COMPANY, Plaintiff in Error,
v.
SAME.

70 *Petition for a Writ of Error.*

And now comes Cheney Brothers Co., Lanston Monotype Machine Co., Locomoblie Co. of America, Northwestern Consolidated Milling

Co., Copper Range Co., The White Co., and Champion Copper Co., being all the above named petitioners in the above entitled consolidated cause with the exception of Pocahontas Fuel Co., and say that on the 20th day of October, 1914, the Supreme Judicial Court within and for the County of Suffolk in the Commonwealth of Massachusetts entered final judgment herein in favor of the above named respondent and against all the above named petitioners, with the exception aforesaid, in which judgment and the proceedings had prior thereto in said consolidated cause certain errors were committed, to the prejudice of all the above named petitioners, with the exception aforesaid, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore the undersigned corporations, being all of said petitioners, with the exception aforesaid, severally pray that a writ of error may issue in this behalf out of the Supreme Court of the United States, to the end that the errors so complained of may be corrected and the said judgment reversed and that a transcript of the record, proceedings and papers in this suit, duly authenticated may be sent to the Supreme Court of the United States.

CHENEY BROTHERS COMPANY,
LANSTON MONOTYPE MACHINE COMPANY,
LOCOMOBILE COMPANY OF AMERICA,
NORTHWESTERN CONSOLIDATED MILLING CO.,
THE WHITE COMPANY,
THE WHITE COMPANY,
71 CHAMPION COPPER COMPANY,
(Original Petitioners), Plaintiffs in Error,
By CHARLES A. SNOW,
WILLIAM P. EVERTS,
Per C. A. S.,
Their Solicitors and Counsel.

Writ of error allowed, upon the execution of a bond by the Copper Range Company, plaintiff in error, as principal and the American Bonding Company of Baltimore, as surety, in the sum of Two Hundred and Fifty (250) Dollars.

November 30, 1914.

ARTHUR P. RUGG,
Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts.

71½ [Endorsed:] Commonwealth of Massachusetts, Suffolk County. In Equity. Cheney Brothers Company et al. (Original Petitioners), Plaintiffs in Error, v. Commonwealth of Massachusetts (Original Respondent), Defendant in Error. Consolidated cause. Nos. 19,803, 20,519, 18,927, 19,896, 19,897, 19,784, 19,408, 19,906, Equity. Petition for writ of error. Filed Nov. 30, 1914. Attest: John F. Cronin, Clerk.

72 COMMONWEALTH OF MASSACHUSETTS,
Suffolk County:

Supreme Judicial Court. In Equity.

No. 19803. Eq.

CHENEY BROTHERS COMPANY (Original Petitioner), Plaintiff in Error,
v.
COMMONWEALTH OF MASSACHUSETTS (Original Respondent), Defendant in Error.

No. 20519. Eq.

LANSTON MONOTYPE MACHINE COMPANY (Plaintiff in Error)
v.
SAME.

No. 18927. Eq.

LOCOMOBILE COMPANY OF AMERICA (Plaintiff in Error)
v.
SAME.

No. 19896. Eq.

NORTHWESTERN CONSOLIDATED MILLING COMPANY (Plaintiff in Error)
v.
SAME.

No. 19897. Eq.

COPPER RANGE COMPANY (Plaintiff in Error)
v.
SAME.

No. 19784. Eq.

THE WHITE COMPANY (Plaintiff in Error)
v.
SAME.

No. 19408. Eq.

CHAMPION COPPER COMPANY (Plaintiff in Error)
v.
SAME.

No. 19906. Eq.

POCAHONTAS FUEL COMPANY (Plaintiff in Error)
v.
SAME.

73 *Assignment of Errors.*

And now come the Cheney Brothers Co., Lanston Monotype Machine Co., Locomobile Company, of America, Northwestern Con-

solidated Milling Co., Copper Range Co., The White Co., and Champion Copper Co., being all of the petitioners in the above entitled consolidated cause, with the exception of the Pocahontas Fuel Co., and being the plaintiffs in error herein, and with their petition for a writ of error make and file the following assignment of errors, and say that there is manifest error in that the Supreme Judicial Court within and for the County of Suffolk in the Commonwealth of Massachusetts erred in refusing certain requests for rulings of law herein specified, duly made by the said petitioners, the plaintiffs in error herein, and otherwise erred in the respects herein set forth, namely:

1. In upholding the constitutionality of the Massachusetts foreign corporation excise contained in Section 56 of Part 3 of chapter 490 of the Massachusetts Acts of 1909, as applied to the several plaintiffs in error, under the "commerce" clause of the Federal Constitution, and in refusing to rule, pursuant to the 2nd request, as follows:

"If applied to the several petitioners, the foreign corporation excise tax of Massachusetts, contained in section 56 of Part III, c. 490, of the Acts of 1909, would be unconstitutional and void because in conflict with the "commerce" clause contained in section 8 of article 1 of the federal Constitution."

2. In refusing to rule, pursuant to the 3rd request, as follows:

"If applied to the several petitioners, the said excise tax would be unconstitutional and void because in contravention of the "due process of law" clause contained in the Fourteenth Amendment to the federal Constitution."

3. In refusing to rule, pursuant to the 5th request, that the said excise, as applied to the several plaintiffs in error, is unconstitutional and void, under the principles set forth in the Western Union and Pullman decisions (216 U. S. 1, 56).

74 4. In refusing to rule, pursuant to the 6th request, that, in order to support the constitutionality of an excise of this description, as applied to a foreign corporation engaged partly in interstate and partly in domestic commerce, "it must appear that the amount of local business and the value of the privilege bear some fair and reasonable relation to the amount of the tax imposed for the privilege."

5. In refusing to rule, pursuant to the 13th request, as follows:

"If applied to the petitioners, the amount of the said excise is unduly great, having reference to the real value of the local business and the property used therein, and is so disproportioned to the volume and profits of the local business and to the value of the privilege taxed that it should be regarded as a mere device to reach or burden the interstate portion of the company's commerce, property, and profits, and, consequently, would be unconstitutional."

6. That the Court below erred in holding that, while this tax might appear unduly large, as applied to the particular corporations before the Court, the statute could not be stricken down as unconstitutional on that account.

7. In refusing to rule, pursuant to the 8th and 11th requests, as follows:

"The reality and substantiality of such local business must be determined by taking into account, among other factors, the percentage of the company's local business as compared with its interstate commerce transacted here."

"If the total profits from such local sales do not equal the amount of the tax paid for the local privilege, such domestic business is not "real and substantial" and the said tax is unconstitutional as applied to such a company, "and in ruling, on the contrary, as follows:

"The ratio of profits on the domestic business to the license tax is an immaterial circumstance."

75 8. In refusing to rule, pursuant to the 19th request, as applied to The White Company, as follows:

"The said tax would be unconstitutional under the "equal protection of the laws" clause as applied to a foreign corporation which lawfully acquired a large amount of permanent and valuable property in this state prior to the imposition of the said tax of 1909 and under the preceding tax system, because the tax of 1909, as so applied, would impose a new and additional tax upon foreign corporations by a discriminating method which was not at the same time employed as to domestic corporations of the same kind carrying on a precisely similar business.

The discriminating method thus employed would consist—

(*a*) In doubling the amount of the tax.

(*b*) In repealing the right theretofore enjoyed by foreign corporations to deduct from their excise taxes the amount paid by them for local property taxes; whereas at the same time no changes were made in the tax system governing similar domestic corporations, which still retained the right to deduct from their excise taxes the amount of local property taxes paid by them."

9. In refusing to rule, pursuant to the 10th request, as follows:

"If the local or domestic business is a mere incident to its interstate commerce transacted here, the said tax imposed for the privilege of carrying on such local business is unconstitutional under the "commerce" clause, and in holding, on the contrary, that any domestic business or functions, however slight, and though mere incidents to interstate commerce, justify the imposition of said excise, unless such business or functions are absolutely necessary to the conduct of such commerce, and hence inseparable from it."

10. In erroneously holding that the maintenance of an office for the resort of customers, for the storage and examination of samples of goods and for the placing of orders, the maintenance of a fixed abode as the headquarters of salesman and customers, the keeping for sale of parts of machines for the purpose of replacing broken parts, repairs of machines previously sold, the sale of machines taken in part payment for new machines sold, the maintenance of a treasurer's office, the directing of deliveries of goods sold in interstate sales, book-keeping in connection therewith, the deposit of funds derived therefrom, the payment of expenses in con-

76 nection therewith, the distribution of dividends out of the profits realized therefrom, the holding of directors' meetings

for declaration of such dividends, and the maintenance of an office for the use of its executive officers, each and all justify the imposition of said tax, even though the company's sales of goods or products are exclusively interstate in character and though such activities or functions are exercised wholly for the purposes of interstate commerce or for purposes fairly incident thereto; and in erroneously holding that these and similar functions, though fairly incident to interstate commerce, justify such an excise, because such functions are not absolutely necessary incidents to such commerce and are not inseparable therefrom, but may voluntar-y be renounced or abandoned and conducted in some other State.

11. In refusing to rule, pursuant to the 14th request, as follows:

"If the petitioner is engaged in this state in the work of conducting some kind of interstate commerce as its principal functions, and in connection therewith a relatively small percentage of local commerce, a tax measured by the entire capital, both interstate and domestic, would be unconstitutional, because its necessary effect is to burden, directly and substantially, the interstate portion of the company's capital, business, and property, and is consequently, based on an unlawful measure."

12. In refusing to rule, pursuant to the 23rd request, as follows:

"If the voluntary abandonment of a local stock of emergency repair parts would necessarily affect the ability of the company to make interstate sales of its machines or products in this state, or the amount of such interstate sales, a tax for the privilege of making local sales of repair parts constitutes a direct and substantial burden upon the company's interstate commerce, and the tax would be unconstitutional if applied to such a company."

13. In refusing to rule, pursuant to the 24th request, as follows:

"If the entire business transacted by the petitioner within the limits of this state consists of sales or deliveries of goods con-
77 templating or requiring transportation from one state into another, or of managing, directing, or superintending such sales or deliveries, then its business within this state is exclusively interstate commerce and within the protection of the "commerce" clause against an excise tax of this description.

The office or place of business where such sales or deliveries are transacted, superintended, directed, or managed, or where books or records covering the same are kept, or where the receipts therefrom are collected, deposited, or distributed, constitutes an instrumentality of interstate commerce within the protection of the "commerce" clause.

This excise tax cannot, therefore, constitutionally be imposed for the privilege of maintaining an office or place of business in this state for the purpose of transacting, managing, or directing such business, provided that no local or domestic sales or deliveries or other business are here carried on or superintended.

This applies equally to offices where commercial travelers have their headquarters, to book-keeping, treasurer's and president's offices, and to offices where directors hold meetings for the purpose of directing such business."

14. In refusing to rule, pursuant to the 25th request, as follows: "Management, by means of directors' meetings and votes, does not constitute the transaction of "business" in any proper sense; but, if so, cannot constitute local or domestic business in this state, where the company's selling or delivery business is wholly interstate in character, and its entire property is located outside of this state, and its directors' votes have no reference to Massachusetts transactions or property."

15. In refusing to rule, as applied to the Copper Range Company, pursuant to the 30th request, as follows:

"Mere ownership for permanent investment by a foreign holding company of shares in foreign corporations, and the receipt and distribution of dividends on such shares, does not constitute the transaction of "business, nor is an office maintained by such com-
78 pany, where directors' meetings are occasionally held, an "usual place of business."

16. In erroneously adopting the following test of the constitutionality of such an excise, as applied to the several plaintiffs in error:

"The test is, whether the foreign corporation transacts domestic business substantial in its essence, and not by comparison, and reasonably susceptible of separation from its interstate commerce.

If it does, the state can fix its own terms, so far as license fee is concerned and in holding that the decisions of this Court merely intend to hold that "a shadow cannot be made the basis of an excise tax," but that when the "local and domestic business exists, then an excise may be levied," however slight may be the amount of local business or however disproportioned to the tax levied for the local privilege granted, provided the local business amounts to more than a mere "shadow"; and in failing to hold that the only proper tests, under the decisions of this Court, are whether the domestic business is "real and substantial," and whether the amount of the excise is "unduly great having reference to the real value" of the domestic privilege or is "disproportioned to such local business, and that if the excise is unduly great or wholly disproportioned to the value of the domestic privilege granted, as applied to the corporations before the Court, such an excise must be regarded as a "mere device to reach and burden the interstate commerce of the company."

17. In erroneously holding, in the case of Cheney Brothers Company that the storage and display at its Massachusetts office of samples of its products, although solely for the purpose of its interstate sales there made, is sufficient justification for the imposition of such an excise.

18. In erroneously holding that it is a material factor whether or not the corporation is "free to renounce" its domestic business, and whether or not such business is "reasonably susceptible of sep-
79 aration from its interstate commerce,' whereas such considerations have no bearing whatever upon the constitutionality of such an excise.

19. In refusing to rule, pursuant to the 1st request, as follows:

"The foreign corporation excise (St. 1909, c. 490, part III, sec.

56), under the construction of the statute heretofore adopted by this Court, does not apply to the several petitioners. They are accordingly severally entitled to recover the taxes paid by them respectively."

20. Because the Court below erred in dismissing the several petitions and in not entering decrees for the several plaintiffs in error, pursuant to the terms of the report, which required such decrees, in case any of the rulings requested by the several petitioners should have been given.

CHENEY BROTHERS COMPANY,
LANSTON MONOTYPE MACHINE COMPANY,
LOCOMOBILE COMPANY OF AMERICA,
NORTHWESTERN CONSOLIDATED MILLING CO.,
COPPER RANGE COMPANY,
THE WHITE COMPANY,
CHAMPION COPPER COMPANY,
(*Original Petitioners*), *Plaintiffs in Error*.
By CHARLES A. SNOW,
WILLIAM P. EVERTS,
Per C. A. S.,
Their Solicitors and Counsel.

80 [Endorsed:] Commonwealth of Massachusetts, Suffolk County. In Equity. Cheney Brothers Company et al. (Original Petitioners), Plaintiffs in Error, v. Commonwealth of Massachusetts (Original Respondent), Defendant in Error. Consolidated Cause. Nos. 19,803, 20,519, 18,927, 19,896, 19,897, 19,784, 19,408, 19,906, Equity. Assignment of Errors. Filed, Nov. 30, 1914. Attest: John F. Cronin, Clerk.

81 Copy.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

(*Bond on Writ of Error.*)

Consolidated Cause. Nos. 19,803, Equity; 20,519, Eq.; 18,927, Eq.; 19,896, Eq.; 19,897, Eq.; 19,784, Eq.; 19,408, Eq.; 19,906, Eq.

CHENEY BROTHERS and Others, Plaintiffs in Error (Original Petitioners),
v.
COMMONWEALTH OF MASSACHUSETTS, Defendant in Error (Original Respondent).

Know all men by these presents,

That we, the Copper Range Company, a corporation duly established and existing under the laws of Michigan, one of the above

named petitioners and plaintiffs in error in said consolidated cause, as principal, and the Fidelity and Deposit Company of Maryland as surety, are held and firmly bound unto the Commonwealth of Massachusetts, the above named respondent and defendant in error in the full and just sum of Two Hundred and fifty (250) dollars to be paid to the said Commonwealth of Massachusetts; to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these Presents.

Sealed with our seals, and dated the 30th day of November in the year of our Lord one thousand nine hundred and fourteen.

Whereas lately in the Supreme Judicial Court of the Commonwealth of Massachusetts sitting within and for the County
82 of Suffolk in the above consolidated suit depending in said Court between Cheney Brothers Company, Lanston Monotype Machine Company, Locomobile Company of America, Northwestern Consolidated Milling Company, Copper Range Company, The White Company, Champion Copper Company and Pocahontas Fuel Company, Petitioners, and the Commonwealth of Massachusetts, Respondent, judgment was rendered against the said petitioners, excepting the said Pocahontas Fuel Company, and in favor of the said Commonwealth of Massachusetts, respondent, and the said petitioners, with the exception aforesaid, the plaintiffs in error herein, having procured a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Commonwealth of Massachusetts citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington thirty days after the date of such citation.

Now the condition of the above obligation is such, that if the said plaintiffs in error or any of them shall prosecute their said writ of error to effect, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

COPPER RANGE COMPANY, [L. S.]
FREDERIC STANWOOD, [L. S.]
Treasurer.

Signed, sealed and delivered in presence of
CHARLES A. SNOW.

[Seal to Copper Range Co. & Fidelity and Deposit Co. of Maryland.]

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
By WALLACE EGERTON,
Resident Vice-President.

Attest:
[SEAL.]
EDMUND MOORE,
Resident Assistant Secretary.

Approved Nov. 30, 1914.
ARTHUR P. RUGG,
Chief Justice of the Supreme Judicial
Court of the Commonwealth of Massachusetts.

83 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the city of Washington in the District of Columbia *thirty days after the date of this citation, pursuant to a Writ of Error filed in the Clerk's Office of the† Supreme Judicial Court of the Commonwealth of Massachusetts, wherein Cheney Brothers Company, Lanston Monotype Machine Company, Locomobile Company of America, Northwestern Consolidated Milling Company, Copper Range Company, The White Company and Champion Copper Company are the plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts this 30th day of November, in the year of our Lord one thousand nine hundred and fourteen.

[SEAL.] ARTHUR P. RUGG,
Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts.

Attest:
JOHN F. CRONIN, *Clerk.*

Nov. 30, 1914.

* Not exceeding 30 days from the day of signing.
† Name of Court to which Writ of Error is directed.

83½ UNITED STATES OF AMERICA,
District of ——, *ss:*

—— —, 190–.

I hereby certify that on the — day of ——, 190–, I served the within citation by ——.

—— ——,
United States Marshal.

DECEMBER 8, 1914.

Service on the within citation is acknoledged for the Commonwealth of Massachusetts, defendant in error.

ROGER SHERMAN HOAR,
Assistant Attorney General.

[Endorsed:] 19803, 20519, 18927, 19896, 19897, 19784, 19408, 19906. Eq. Cheney Brothers Company et al. *vs.* Commonwealth of Massachusetts. Citation. Filed Dec. 10, 1914. Attest: John F. Cronin, Clerk.

84 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court. In Equity.

[Consolidated Cause.]

[Nos. 19,803; 20,519; 18,927; 19,896; 19,897; 19,784; 19,408; 19,906; Equity.]

CHENEY BROTHERS COMPANY et al. (Original Petitioners),
Plaintiffs in Error,
v.
COMMONWEALTH OF MASSACHUSETTS (Original Respondent),
Defendant in Error.

Præcipe.

To the Clerk of the Supreme Judicial Court within and for the County of Suffolk:

Please incorporate into the transcript of the record, to accompany your return to the writ of error, the report to the Supreme Judicial Court, the order for consolidation of the causes, the agreed statement of facts, the petitioners' requests for rulings, rescript and final decree, besides copies of petition for writ of error, assignment of errors, bond and citation and proceedings thereon and copy of opinion of full bench, the counsel for the plaintiffs in error deeming the above portions of the record to be material to and necessary for a decision of the questions involved.

You may also annex a copy of the amended petition and answer only in the Cheney Brothers Company petition (No. 19,803) the pleadings in the other petitions being in the same form, though the pleadings are not deemed to be important.

Yours respectfully,

CHARLES A. SNOW,
WILLIAM P. EVERTS,
Per C. A. S.,
Counsel for Plaintiffs in Error.

December 4th, 1914.

85 *Affidavit of Service.*

I, Charles A. Snow, one of the counsel for the plaintiffs in error, declare and state that I have served a copy of the foregoing præcipe on the respondent, by sending a copy thereof by registered mail, addressed to "Hon. Thomas J. Boynton, Attorney General of the Commonwealth of Massachusetts," the counsel for the defendant in error, at his usual place of business at the State House, Boston, Massachusetts, postage prepaid, on December 4th, 1914.

CHARLES A. SNOW.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

BOSTON, December 4th, 1914.

Then personally appeared the above named Charles A. Snow and made oath that the foregoing statement by him subscribed are true.
Before me

ANTHONY J. DOHERTY,
Justice of the Peace.

85½ [Endorsed:] Commonwealth of Massachusetts, Suffolk County. In Equity. Cheney Brothers Company et al. (Original Petitioners), Plaintiffs in Error, v. Commonwealth of Massachusetts (Original Respondent), Defendant in Error. Consolidated Cause. Nos. 19,803, 20,519, 18,927, 19,896, 19,897, 19,784, 19,408, 19,906. Equity. Praecipe. Filed Dec. 4, 1914. Attest: John F. Cronin, Clerk.

86 *Certificate of Lodgment.*

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

I, John F. Cronin, Clerk of said Court, do hereby certify that there was lodged with me as such Clerk, on November 30th, 1914, in the matter of Cheney Brothers Company versus Commonwealth of Massachusetts, the original Bond of which a copy is herein set forth and on December 4th, 1914, two copies of the Writ of Error, as herein set forth,—one for the defendant, the Commonwealth of Massachusetts, and one to be filed in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at my office, in Boston, Massachusetts, this seventeenth day of December, 1914.

[SEAL.] JOHN F. CRONIN,
Clerk of the Supreme Judicial Court.

87 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

I, John F. Cronin, Clerk of the Supreme Judicial Court within and for the County of Suffolk and Commonwealth of Massachusetts, do hereby certify that the papers hereunto annexed are an exemplification of the record in the consolidated case of Cheney Brothers Company et al., Petitioners, vs. Commonwealth of Massachusetts, Respondent, in said Supreme Judicial Court determinated; and attached hereto and transmitted with said record are a copy of the

Opinion of the Supreme Judicial Court for the Commonwealth, attested by the Reporter of Decisions; a copy of the application for Writ of Error; a copy of Assignment of Errors and the Original Citation with copies of service endorsed thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Boston this 14th day of December in the year of — Lord one thousand nine hundred and fourteen.

[SEAL.] JOHN F. CRONIN, *Clerk*.

Endorsed on cover: File No. 24,490. Massachusetts Supreme Judicial Court. Term No. 314. Cheney Brothers Company, Lanston Monotype Machine Company, Locomobile Company of America, et al., plaintiffs in error, vs. The Commonwealth of Massachusetts. Filed December 28th, 1914. File No. 24,490.

Office Supreme Court, U. S.
FILED
APR 3 1916
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 53, 12

CHENEY BROTHERS COMPANY, LANSTON MONOTYPE MACHINE COMPANY, LOCOMOBILE COMPANY OF AMERICA ET AL.,
Plaintiffs in Error,

v.

THE COMMONWEALTH OF MASSACHUSETTS.

MOTION.

CHARLES A. SNOW,
WILLIAM P. EVERTS,
Counsel for Plaintiffs in Error.

Supreme Court of the United States.

No. 314. OCTOBER TERM, 1915.

CHENEY BROTHERS COMPANY, LANSTON MONOTYPE MACHINE COMPANY, LOCOMOBILE COMPANY OF AMERICA ET AL.,
Plaintiffs in Error,

v.

THE COMMONWEALTH OF MASSACHUSETTS.

MOTION OF PLAINTIFFS IN ERROR.

Now come the plaintiffs in error and move that the argument be postponed until the last week of the term at which arguments will be heard, or such other time, late in the term, as the Court may assign.

REASONS FOR MOTION.

The above consolidated cause involves the constitutionality of the former Massachusetts foreign corporation tax law (St. 1909, Chap. 490, Part III, Sec. 56), as applied to these companies.

This statute has since been amended by St. 1914, Chap. 724.

Similar cases, involving the constitutionality of the present amended statute, under the Federal Constitution, were argued before the Massachusetts Court in March, and an early decision is anticipated.

The cases before that Court also involve the question whether both the old and the amended statutes are unconstitutional under the State Constitution, a question not arising upon the present record.

We respectfully submit —

(1) That it is desirable that this Court should have the advantage of the latest views of the Massachusetts Court in the cases not yet decided.

(2) That, should that Court hold that these taxes are not "reasonable excises," under the terms of the State Constitution (Mass. Const., Chap. 1, Sec. 1, Art. 4), a further hearing might be simplified or possibly avoided.

(3) That the whole controversy, as to both the old and the amended statutes, should be heard and settled at the same time, thereby avoiding duplication of arguments upon the similar questions involved in both sets of cases.

(4) We request a reasonable postponement of the argument, in order that the decision of the Massachusetts Court may first be rendered and brought here, thereby enabling us to file a further motion that all the cases be heard together, the counsel interested being the same.

By their counsel,

CHARLES A. SNOW,
WILLIAM P. EVERTS.

The Commonwealth of Massachusetts acknowledges service of a copy of the above motion, to be presented on April 3, 1916.

HENRY C. ATTWILL,
Attorney-General of Massachusetts,
for Defendant in Error.

MARCH 28, 1916.

FILED
APR 3 1916
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1915

No. [redacted]12

CHENEY BROTHERS COMPANY, LANSTON MONOTYPE MACHINE COMPANY, LOCOMOBILE COMPANY OF AMERICA et al.,

PLAINTIFFS IN ERROR,

v.

THE COMMONWEALTH OF MASSACHUSETTS

BRIEF OF RESPONDENT IN OPPOSITION TO MOTION FOR POSTPONEMENT

HENRY C. ATTWILL,
Attorney-General for the Commonwealth of Massachusetts

WM. HAROLD HITCHCOCK,
Assistant Attorney-General

Supreme Court of the United States.

October Term, 1915.

No. 314.

CHENEY BROTHERS COMPANY, LANSTON MONOTYPE MACHINE COMPANY, LOCOMOBILE COMPANY OF AMERICA ET AL., *Plaintiffs in Error,*

v.

THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF OF RESPONDENT IN OPPOSITION TO MOTION FOR POSTPONEMENT.

The plaintiffs in error ask this court to postpone the argument of these cases to await the possible arrival in this court of other cases just argued and not yet decided by the Supreme Judicial Court of Massachusetts. The cases now before the court involve the validity of taxes paid by seven corporations in 1913 under St. 1909, c. 490, part III, § 56. The general scheme of this statute and the validity of taxes levied under it were sustained by this court in Baltic Mining Company *v.* Commonwealth, 231 U. S. 68.

pass upon this question after a full consideration of all matters involved in it, and it cannot be assumed in advance of a decision that that court will sustain this statute. If, however, it should do so, there is no occasion for hurrying these new cases before this court and arguing them with the cases at bar, with which they are entirely unconnected, without opportunity for adequate preparation.

Respectfully submitted,

HENRY C. ATTWILL,
Attorney-General.

WM. HAROLD HITCHCOCK,
Assistant Attorney-General.

SUPREME COURT, U. S.
FILED
OCT 9 1907
JAMES H. MCKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 12.

CHENEY BROTHERS COMPANY ET AL.

Plaintiffs in Error

v.

THE COMMONWEALTH OF MASSACHUSETTS.

In Error to the Supreme Judicial Court of the State of Massachusetts.

BRIEF OF PLAINTIFFS IN ERROR UPON RE-ARGUMENT.

CHARLES A. SNOW,
WILLIAM P. EVERTS,
Counsel for Plaintiffs in Error.

Supreme Court of the United States.

OCTOBER TERM, 191'.

No. 12.

CHENEY BROTHERS COMPANY ET AL.
Plaintiffs in Error,

v.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPREME JUDICIAL COURT
OF THE STATE OF MASSACHUSETTS.

BRIEF OF PLAINTIFFS IN ERROR, UPON RE-ARGUMENT.

CHARLES A. SNOW,
WILLIAM P. EVERTS,
Counsel for Plaintiffs in Error.

The Fort Hill Press
SAMUEL USHER
BOSTON, MASS.

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Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 12.

CHENEY BROTHERS COMPANY ET AL.,
Plaintiffs in Error,

v.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

BRIEF OF PLAINTIFFS IN ERROR, UPON REARGUMENT.

STATEMENT OF CASE.

For specification of errors relied on and statement of the facts, we refer to our original brief (pp. 10 to 12, 1 to 9).

The Massachusetts foreign corporation excise is claimed to be unconstitutional for two main reasons:

(1) It must have the same "necessary operation and effect" as the Kansas statute condemned in the *Western Union* and *Pullman* cases (216 U. S. 1, 56), because it is in precisely the same terms, so far as it applies to these companies.

Within the $2,000 limit (and that is the only kind of tax here involved), the Massachusetts excise " fluctuates " on a percentage basis and is measured by capital stock, exactly like the Kansas tax.

If interstate business and capital increase to the slightest extent, the tax rises in exact proportion.

The amount of the tax cannot possibly be determined without taking into account the amount of business and property which are not subject to State taxation. It is not permissible to regard it as a privilege tax measured by something not having a *direct* and *necessary* relation to interstate business, because it is greater or less according as such business, as represented by the authorized capital stock, is greater or less, and " fluctuates " at all stages.

The tax is, therefore, *necessarily* a " burden " on the interstate portion of the business represented by the capital stock and conflicts with the " commerce " clause, within the direct authority of those cases.

(2) The tax, as applied to the *White* company, denies " equal protection of the laws," within the principles established by *Southern Railway* v. *Greene* (216 U. S. 400).

Other less important issues are stated later.

Terms of Original Massachusetts Statute here Involved.

> " Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the Commonwealth, an excise tax to be assessed by the tax commissioner of one-fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars." (Mass. Acts 1909, Chap. 490, Part III, Sec. 56.)

Further light is thrown on the Massachusetts system, as involving a " fluctuating " tax up to $2,000, by repeal of

this limit, so that now all such excises "fluctuate" *without limit* in the same way as this tax "fluctuates," as applied to all companies before the Court. (Mass. Acts 1914, Chap. 724.)

Terms of Kansas Statute Condemned as Unconstitutional.

The Kansas tax was in precisely the same terms as the Massachusetts excise, except that it was an initial charter fee and it had no maximum limit, an immaterial difference here, because none of these companies is subject to or at all affected by the maximum provision.

It prescribed that each foreign corporation, as a condition of the right to transact domestic business in Kansas, should pay a charter fee of "one-tenth of one per cent of its authorized capital, upon the first one hundred thousand dollars of its capital stock, or any part thereof; and upon the next four hundred thousand dollars, or any part thereof, one-twentieth of one per cent."

For "each million or major part thereof over and above the sum of $500,000" the excise amounted to $200, or the equivalent of one-fiftieth of one per cent on the capital stock, which is the exact percentage payable *annually* under the Massachusetts statute.

Pullman Co. v. *Kansas*, 216 U. S. 56, 59.

Statutes Relating to White Company Tax.

When the *White* company entered Massachusetts and acquired its "permanent" property investment, under the tax system of 1903, the foreign corporation excise amounted to one one-hundredth of one per cent, but it was provided that the corporation "may deduct from such tax the amount of taxes upon property paid by it to any

city or town in the Commonwealth during the preceding year." (Mass. Acts 1903, Chap. 437, Sec. 75.)

After these investments were made the tax was doubled in 1907, and the right to deduct local property taxes was repealed.

> Acts 1907, c. 578; now appearing in the same form in
> Acts 1909, c. 490, Part III, Sec. 56.

No similar changes were then or thereafter made affecting domestic corporations engaged in precisely the same lines of business as foreign corporations, including the *White* company.

BRIEF OF ARGUMENT.

I.

Commerce Clause.

MASSACHUSETTS EXCISE IS UNCONSTITUTIONAL UNDER THIS CLAUSE, WITHIN THE DIRECT AUTHORITY OF THE "WESTERN UNION" DECISIONS (216 U. S. 1, 56).

A "fluctuating" percentage excise of this description which is measured by the entire capital stock of a foreign corporation engaged in transacting interstate and domestic commerce at the same places and through the same instrumentalities, is unconstitutional under the "commerce" clause and void, although it professes to be imposed exclusively for the privilege of transacting local business.

Western Union Telegraph Co. v. *Kansas*, 216 U. S. 1.
Pullman Co. v. *Kansas*, 216 U. S. 56.
Ludwig v. *Western Union Telegraph Co.*, 216 U. S. 146.
Western Union Telegraph Co. v. *Andrews*, 216 U. S. 165.
Atchison &c. Ry. Co. v. *O'Connor*, 223 U. S. 280.
Flint v. *Stone Tracy Co.*, 220 U. S. 107, 163.
Oklahoma v. *Wells, Fargo & Co.*, 223 U. S. 298.

Scope of Western Union Decisions (216 U. S. 1, 56).

The *Western Union* cases conclusively established the following principles, as applied to a tax in the precise terms of the Massachusetts excise, excepting only that the Massachusetts tax is subject to a maximum of $2,000, which, however, has no application or materiality here, so far as any of these companies is concerned, because they are not subject to it in any way, but to a purely "fluctuating" tax which rises or falls in exact accordance with changes in their capital stock employed in interstate commerce.

In other words, the Kansas and Massachusetts excises make no attempt, like the California and the new Kansas statutes, to classify foreign corporations by using capital stock as a measure of their size, and to establish *fixed* license fees for the several gradated classes.

The original Kansas and the Massachusetts excises are on a percentage basis, " fluctuating " at all stages. Every dollar of increased capital used in extending interstate commerce, means an additional tax.

Indeed, the Massachusetts excise is more clearly a " fluctuating " tax even than that of Kansas, for in certain exceptional cases the latter might remain fixed for a short period. Thus, for example, if the capital were $1,010,000, the company would pay no additional tax until the capital exceeded $2,000,000, under the provision that an additional tax of $200 must be paid " for each million or major part thereof over and above the sum of $500,000 " (216 U. S. 56, 59).

The *Western Union* cases decided:

(1) This Court will always look through forms and reach the substance. The " necessary operation and effect " of a tax, is what determines its constitutionality, rather than its form or professions.

(2) A statute which has the " necessary operation and effect " of burdening interstate commerce is void, even though it professes to be imposed exclusively for the local privilege of transacting domestic commerce.

(3) The Kansas tax had this " necessary operation and effect," as applied to a foreign corporation transacting both interstate and domestic commerce conjointly at the same places and through the same instrumentalities.

(4) The capital stock of a corporation represents its entire business, both interstate and domestic, and its property everywhere. Therefore, a " fluctuating " percentage tax measured by authorized capital stock *necessarily* has the

effect of taxing and "burdening" every thing represented thereby, including its interstate commerce.

(5) A tax, the amount of which can only be determined by taking into account increases in interstate business and the capital employed therein, and which increases in exact proportion to every dollar's addition to such capital, has a direct and *necessary* relation to interstate commerce and the volume thereof, and is, therefore, *necessarily* a "burden" thereon.

If the Kansas tax *necessarily* had the effect of "burdening" interstate commerce, surely the Massachusetts tax, in precisely the same terms, must have precisely the same "necessary operation and effect," and is, therefore, void.

For the correctness of our statements as to the meaning and scope of the *Western Union* decisions, it is necessary only to refer to the elaborate opinions rendered there (216 U. S. 1, 56) and in the later cases in the same volume.

Mr. Justice Harlan says:

> "If a statute, by its *necessary operation*, really and substantially *burdens* the interstate business of a foreign corporation seeking to do business in a State, or imposes a tax on its property outside of such State, then it is unconstitutional and void, although the State legislature may not have intended to enact an invalid statute.
> . . .
> "The capital stock of the company *represents*, we repeat, *all* its business, property and interests throughout the United States and foreign countries" and such a tax "based on all its capital stock . . . is, *in effect*, a direct burden and tax on its interstate business, as well as on its property outside of the State."
>
> *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146, 162, 163.

These principles have repeatedly been reaffirmed.

It is now claimed that these remarks mean nothing or something wholly different from what was said.

The effect of the *Western Union* cases is thus stated by Mr. Justice Day:

> "This Court held, looking through forms and reaching the substance of the thing, that the tax thus imposed was in reality a tax upon the right to do interstate business within the State, and an undertaking to tax property beyond the limits of the State; that whatever the declared purpose, when reasonably interpreted, the *necessary operation and effect* of the act in question was to *burden* interstate commerce and to tax property beyond the jurisdiction of the State, and it was therefore invalid."
>
> *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 163.

Referring to the *Western Union* and other cases, the same justice remarks:

> "A tax has only been invalidated where its *necessary effect* was to *burden* interstate commerce, or to tax property beyond the jurisdiction of the State."
>
> *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 86.

WHAT THE WESTERN UNION DECISIONS DID NOT DECIDE.

The Principles of the WESTERN UNION Cases were Not Confined to QUASI-Public Corporations, but also Extended broadly to all Classes of Trading Corporations Conducting conjointly both Interstate and Domestic Commerce at the Same Places and through the Same Instrumentalities.

The Massachusetts Court, in its earlier decisions, strenuously adhered to the view that the principles of the *Western Union* cases were strictly limited in their scope, and that

they had application only to companies doing a *quasi*-public business, like telegraph and sleeping car companies.

> *Baltic Mining Co.* v. *Commonwealth*, 207 Mass. 381, 390.
>
> *S. S. White Dental Mfg. Co.* v. *Commonwealth*, 212 Mass. 35, 42.

No remarks in the elaborate opinions have ever been pointed to which could justify such an extreme contention. Nor have any reasons ever been suggested why trading companies are not entitled to the same protection under the "commerce" clause as telegraph companies. Indeed, many of the earlier cases relied on for these decisions involved sales of goods in channels of interstate commerce. See

> *Robbins* v. *Shelby Taxing District*, 120 U. S. 489.
>
> *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727.

This erroneous view as to the limited application of these principles has been definitely rejected by this Court, which declares:

> "*Interstate commerce of all kinds* is within the protection of the Constitution of the United States, and it is not within the authority of a State to tax it by burdensome laws. . . .
>
> "True it is that their products are sold and shipped in interstate commerce, and to that extent they are engaged in the business of carrying on interstate commerce."
>
> *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 86.
>
> *Kansas City Ry.* v. *Kansas*, 240 U. S. 227, 234, 235.

The Court below at last has admitted this to be true:

> "The contention of the Commonwealth that these sentences [in earlier opinions] were not intended to apply

to and do not apply to corporations doing a *commercial* or *trading* business, but only to transportation corporations, cannot be supported."

Cheney Brothers case (*Marconi Wireless Tel. Co. et al.* v. *Commonwealth*), 218 Mass. 558, 564.

Similarly, the reasoning and principles of the *Western Union* decisions were not intended to be limited to transportation or *quasi*-public companies, although the Massachusetts Court apparently still clings to that erroneous view, while expressly admitting that the "commerce" clause protects trading companies equally with *quasi*-public corporations.

Western Union Cases Did Not Decide that only "Indispensable" and "Inseparable" Incidents to Interstate Commerce are Protected from State Taxation, under the "Commerce" Clause.

The Massachusetts theory that only "indispensable," "reasonably necessary" and "inseparable" incidents to interstate commerce, are protected by the "commerce" clause from State taxation, will later be considered.

Clearly, the *Western Union* decisions did not so decide, nor has any other case in this Court so decided.

On the contrary, the *Pullman* case (216 U. S. 56) directly decided that cars used in local traffic, which were readily removable from the State and thus were not "inextricably interwoven" with interstate commerce, presented no excuse for State taxation.

Whether they were or were not indispensable incidents to interstate commerce, whether they were or were not "inextricably interwoven" with such commerce, were considerations which this Court paid no attention to. It was sufficient to show that the cars were ordinary instrumentalities of or incidents to interstate commerce and were, in fact, used conjointly in domestic and interstate

commerce alike. If so, such an excise as the Kansas or Massachusetts statutes impose, is void.

Western Union Cases Did Not Decide that such an Excise is Constitutional, if the Company may Voluntarily Abandon or Renounce Its Local Business, without Serious Damage to Its Interstate Commerce.

The unsupported theory of the Court below is that there must be an " inextricable connection " or " interweaving " between the two classes of commerce, and that, if the local business can be abandoned or renounced voluntarily, without serious damage to the interstate commerce, such an excise is valid.

Obviously, such a theory receives no comfort from the *Western Union* decisions.

If it were law, the *Pullman* case (216 U. S. 56) should have been decided the other way, for the *Pullman* company could have abandoned its local traffic with the greatest of ease.

As pointed out by Mr. Justice Holmes (216 U. S. 56, 75), all that was needed was to roll its cars out of the State or to cease the sale of tickets for local business.

There was no inevitable loss to interstate receipts arising from giving up domestic traffic nor was there any " inextricable connection " between the two classes of business.

In any event, such a possibility was nowhere alluded to as the ground for the *Pullman* decision.

The true reason for that decision was wholly apart from any consideration as to whether or not the local business could readily be abandoned or renounced.

The " necessary operation and effect " of such an excise was held to be a tax and, therefore, a *burden* on the interstate portion of the capital and the business represented thereby. It made no difference whether the local traffic could readily be abandoned or only at great loss.

The companies possessed the constitutional right to con-

tinue the transaction of local business in conjunction with interstate commerce and by use of the same instrumentalities, without abandoning domestic traffic, in complete disregard of a tax which was based on an unconstitutional measure, which *necessarily burdened* its interstate commerce.

The theory of the Court below finds its sole comfort in a *dictum* which has never since been supported or even cited with approval, where it was said:

> " The company cannot complain of being taxed for the privilege of doing a local business which it is *free to renounce*."
>
> *Pullman Co.* v. *Adams*, 189 U. S. 420, 422.

There the tax was held constitutional.

In *Pullman Co.* v. *Kansas* (216 U. S. 56) the same company was, of course, equally " free to renounce " the local traffic. Yet the tax was held unconstitutional.

In *Allen* v. *Pullman Co.* (191 U. S. 171) the tax was also held unconstitutional.

Obviously, if freedom to " renounce " local business were the controlling factor, both of the last named *Pullman* cases should have been decided the other way.

Or, if it were the real reason for the *Adams* decision, that case must be considered as overruled by the later *Allen* and *Kansas* decisions.

That it was a mere *dictum* as to a wholly unimportant consideration, is clearly shown by the fact that it is not even discussed in the *Western Union* decisions.

That the *Adams* and *Allen* decisions do not stand as authority for any such proposition, is distinctly shown by the reference made by Mr. Justice Harlan:

> " Indeed, we could not hold otherwise than we do in the present case without overruling or materially modifying the principles announced in the *Allen* case."
>
> *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 44.

Western Union Cases Did Not Decide that a "Direct Burden" on Interstate Commerce must be Shown. They Require only a "Burden." If the "Necessary Operation and Effect" of such an Excise is to "Burden" Interstate Commerce, it is Unconstitutional. Whether It so Operates directly or indirectly, is an Immaterial Inquiry.

Whatever may be the real effect of the *Western Union* decisions, it is, at least, clear that the Massachusetts Court wholly misinterprets their meaning in stating that it was there decided that this Court —

> "will ascertain whether, in truth, the impost is a *direct* tax upon interstate commerce . . . and, applying this rule, statutes under consideration in each of these cases . . . were found to be a *direct burden*" on interstate commerce.
>
> *S. S. White Dental Mfg. Co.* v. *Commonwealth*, 212 Mass. 35, 42.

The real effect of the *Western Union* decisions is stated by Mr. Justice Day:

> "Whatever the declared purpose, when reasonably interpreted, the necessary operation and effect of the act in question was to *burden* interstate commerce . . . and it was therefore invalid."
>
> *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 163.

Also, by the same Justice:

> "A tax has only been invalidated where its necessary effect was to *burden* interstate commerce."
>
> *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 86.

So, also, by Mr. Justice Harlan:

> "If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and

although the company may do both interstate and local business."

Western Union Tel. Co. v. *Kansas*, 216 U. S. 1, 27.

"If a statute, by its necessary operation, really and substantially *burdens* the interstate business of a foreign corporation seeking to do business in a State . . . then it is unconstitutional and void."

Ludwig v. *Western Union Tel. Co.*, 216 U. S. 146, 162.

See, also,

Crutcher v. *Kentucky*, 141 U. S. 47, 59.

"This *burden* the State cannot impose, *either directly* or as a *condition* to the grant of a privilege which it may confer or withhold."

Crane Co. v. *Looney*, 218 Fed. 260.

The above statements indicate sufficiently the uniform result of the authorities. Yet it is true that unguarded expressions to the contrary may be found.

Referring to the *Baltic* decision, Mr. Justice Hughes remarks:

"It was because the tax, although measured by authorized capital stock, could not in view of its limitations be regarded as imposing a *direct burden* upon interstate commerce that the tax was upheld."

Kansas City Ry. v. *Kansas*, 240 U. S. 227, 235.

Any careful examination of a long line of decisions demonstrates that a "direct burden" need not be shown, but that any State excise which, by its necessary operation and effect, *burdens* interstate commerce, whether *directly or indirectly*, is unconstitutional.

That was held to be the necessary effect of the Kansas statute, and the Massachusetts excise, in precisely the same terms, must have the same necessary operation.

Western Union Decisions were Not Distinctly and Consciously Placed upon the Ground that the Tax was a "Fluctuating" Percentage Tax, as Opposed to Fixed License Fees Assessed upon Classes of Corporations and Gradated according to the Size of the Corporation, as Measured by the Amount of its Capital Stock.

But the Kansas Tax, like that of Massachusetts, was, in fact, a "Fluctuating" Percentage Tax.

Both the Kansas and the Massachusetts excises clearly come under the head of "fluctuating" percentage taxes. If the capital devoted to interstate commerce is increased by one dollar, the tax rises in exact proportion under the Massachusetts tax. That is the "necessary operation and effect" of any "fluctuating" excise on a percentage basis measured by capital stock.

The same result does not *necessarily* follow from a classified fixed tax, although the classification is determined by the amount of capital stock.

Let us suppose that the tax is $200 for a million-dollar corporation and $500 for companies with a capital exceeding $5,000,000. Under such a tax, if the million-dollar corporation increases its capital required for interstate business by an additional million, it pays no larger tax than before. Consequently, there is no additional tax which *necessarily* follows an increase in interstate business and capital. So that the "necessary operation and effect" of that kind of excise taxation is quite different from "fluctuating" percentage taxes, like those of Kansas and Massachusetts.

Nor is the actual effect of the latter's tax differentiated by the existence or non-existence of a maximum limit, whether $2,000 or $100,000. Until that limit is reached (and only in the *Lanston* case is a $10,000,000 capital here involved), the tax absolutely "fluctuates" upon a percentage basis. As applied to all the companies now before the Court (except the *Lanston* company), the tax increases, if

one dollar of additional capital is required for extensions of interstate commerce. *Wherever* and *whenever* additional capital is needed for these purposes (as must frequently happen in the case of all large corporations doing an interstate business), the " necessary operation and effect " is an additional tax based solely on increases in interstate business and the capital required therefor. There is, therefore, no escape from the conclusion that a " burden " is imposed on interstate commerce through the *necessary* and inevitable effect of such an excise.

But, whi the Kansas and Massachusetts statutes fully meet the test of " fluctuating " taxes and the distinction between such excises and fixed classified taxes is sufficiently clear, it would not be quite accurate to say that the *Western Union* decisions were consciously based on this distinction.

The only suggestion of this distinction comes from the inquiry of Mr. Justice Holmes, who queried (216 U. S. 1, 54, 55) what would be the result, if a fixed tax of exactly the same amount, namely, $20,100, should be imposed on the Western Union company and should later come before the Court, — a question which has apparently been answered in the latest cases.

Baltic Mining Co. *v.* Massachusetts (231 U. S. 68) Did Not Modify the Principles of the Western Union Decisions, but was Decided upon Its Special Facts.

It may safely be admitted here, that, if the Massachusetts statute had imposed a fixed excise of $2,000 on corporations above a capitalization of $10,000,000 and of $1,000 on those between $5,000,000 and $10,000,000, such an excise would be constitutional, because it would not " fluctuate," as the Massachusetts excise, in fact, does, upon a percentage basis, increasing in exact proportion to every additional dollar's investment for purposes of extension of interstate business.

No one claims that the *Baltic* case overruled the *Western Union* decisions, for the Court expressly states:

> " Every case involving the validity of a tax must be decided upon its own facts, and having no disposition to limit the authority of those [*Western Union*] cases, the facts upon which they were decided must not be lost sight of in deciding other and alleged similar cases."
>
> *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 85.

The *Baltic* case rests upon its special facts and has only a limited application, for the Court found that the Baltic company did not, like the Western Union company, conduct interstate and domestic business at the same places and through the same instrumentalities.

As applied to the Baltic company, the Massachusetts statute was sustained. Here the facts, as applied to the present companies, are totally different, although the statute is the same.

No attempt was made in the *Baltic* case to differentiate the terms of the Kansas and Massachusetts statutes.

Nor could any substantial distinction have been established, because of the fact that other companies not then before the Court were totally exempted from taxation beyond a $2,000 excise, representing one-fiftieth of one per cent on a capitalization of $10,000,000.

The companies there under consideration were subjected to a " fluctuating " percentage tax, increasing in exact proportion to every dollar of additional capital used in or required for extensions of interstate business.

The Kansas and Massachusetts statutes being identical in all material respects, the *Baltic* decision must rest upon its special facts.

The vital fact there appearing was, as stated by the Court:

> " From the statement of facts it is apparent, however, that each of the corporations in question is carrying on

a purely local and domestic business *quite separate from its interstate transactions.*"

Baltic Mining Co. v. *Massachusetts*, 231 U. S. 68, 86.

This fact was in complete contrast with the facts as to the *Western Union* and *Pullman* companies, for, as the Court states:

" In the Kansas cases the business of both complaining companies was commerce, the *same instrumentalities* and the *same agencies* carrying on in the *same places* the business of the companies of State and interstate character " (*ibid.*, pp. 85, 86).

The Court was thoroughly justified in this distinction.

The Baltic company did not, in fact, transact both interstate and domestic business *in conjunction*, making use of the *same instrumentalities*, the *same agencies* and the *same places*.

Its entire selling business, both interstate and domestic (if any), was transacted through the *United Metals Selling* agency in New York. There was no sales office in Massachusetts.

Its local Boston office and the functions and activities there carried on had nothing whatsoever to do with sales, or with commerce of any kind.

The occasional sales negotiated in Massachusetts for delivery therein from the Michigan mine were all made through the New York selling agency, and all involved interstate commerce.

No " domestic commerce " whatsoever was conducted by the company. Its local functions and activities were not merely separable from its interstate commerce, but were, in fact, carried on wholly apart and separate from its New York selling agency.

No Massachusetts office was devoted to both classes of commerce, by use of the *same places* and the *same instrumentalities*.

Here the facts are totally different.

All of these companies (except *Copper Range*, which is a holding company and the *White* company, where no question is raised under the "commerce" clause) are conducting or managing interstate sales or deliveries in complete conjunction with local sales, activities or functions, through the use of the *same places* and the *same instrumentalities*, precisely as the *Western Union* company used its offices and the *Pullman* company its cars for purposes of interstate and domestic traffic in conjunction.

In certain of these cases (*Cheney*, *Northwestern*, *Lanston* and *Locomobile*) the *same salesmen* negotiated both interstate and domestic sales at or through the *same offices*, and by use of the *same instrumentalities*.

In the *Champion* case, the *same treasurer* managed or conducted at the *same office* interstate deliveries and certain local activities and functions, like bookkeeping, collections and deposits. All local functions were carried on at the *same office* in connection with the management of a business which was wholly interstate in character.

While an effort is here made to show from the original record that the facts as to the *S. S. White* company (argued with the *Baltic* case) presented a situation differing from that of the *Baltic* company, no reference appears in the *Baltic* opinion to the special *S. S. White* facts as bearing, in any material way, upon the decision.

The opinion rests wholly upon the special facts applying to the *Baltic* company. The real reason for the decision depends on the special considerations above stated.

Otherwise, the decision could not be supported, except by overruling the *Western Union* decisions.

It clearly did not profess to hold that, while a "fluctuating" tax is bad, if without limits, it is valid, if within a maximum limitation which had not been reached by any company before the Court, and which can be attained only by the largest companies, which alone are subject to or

affected by the limitation. Nor was the decision at all based on the consideration that $2,000 is a small amount or that it is a *reasonable* tax.

Reasons Now Given for the Baltic Decision do Not at all Represent the Real Ground upon which It was Rested.

Kansas City Railway v. Kansas, 240 U. S. 227.

For a long time this Court had no occasion to restate what the *Baltic* decision stands for.

The first attempt to explain its true scope and meaning was made by Mr. Justice Hughes, who says:

> "It was because the [Baltic] tax, although measured by authorized capital stock, could not *in view of its limitations* be regarded as imposing a *direct burden* upon interstate commerce that the tax was upheld."
>
> *Kansas City Railway* v. *Kansas*, 240 U. S. 227, 235.

The maximum limit of $2,000 is here referred to, which is attainable only by the largest corporations, with a capital of $10,000,000 or more, and not affecting the *Baltic* company in any way.

Whatever the real reason for the *Baltic* decision, the most superficial examination of that elaborate opinion shows, beyond possibility of doubt, that the maximum limitation could not have played any important part, far from being the fundamental reason for the decision.

Is it conceivable that the real reason for this important decision is to be found in a casual statement in a single line, in the midst of a ten-page opinion? The sole reference is in these terms:

> "*Further*, the Massachusetts statute limits the tax to a maximum of $2,000."
>
> *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 87.

In form, this is merely the narration of an additional casual fact appearing in the case, but not the statement of an important, much less the fundamental *reason* for the decision.

If it had been, would not some attempt have been made to show the materiality of that fact, as applied to the *Baltic* company?

It is fully apparent that the $2,000 maximum tax had not the slightest bearing upon or application to the *Baltic* company. It was not subject to or in any way affected by that tax.

The tax which it complained of was the $500 tax levied on it.

Its tax "fluctuated" in exact accordance with the every dollar's increase in its interstate business, as represented by the amount of additional capital employed therein.

It was of no concern to the *Baltic* company whether or not a $10,000,000 company was taxed for the fixed amount of $2,000, and was exempted from taxation beyond that amount, and was thus subjected to a *non-fluctuating* tax.

It is beyond belief that the real reason for throwing that company out of court depended on a tax wholly irrelevant to it, but applicable only to other corporations of the largest size.

Until the limitation was reached, the tax "fluctuated" precisely like the Kansas tax. If the limit had been $100,000, the "fluctuating" character of the tax actually involved in the case would have been precisely the same, as applied to corporations of ordinary size.

The company was clearly entitled to an adjudication as to the "necessary operation and effect" of the $500 tax, *as applied to itself alone*, regardless of the effect of the Massachusetts system of taxation on other corporations not then before the Court.

Apparently, Mr. Justice Hughes, by use of the phrase "in view of its limitations," intended to imply that the

Massachusetts tax, with a maximum limit, was a *fixed* tax, overlooking the fact that it necessarily "fluctuated" on a percentage basis, when applied to all except the largest corporations, in exact proportion to increases in their interstate business and the capital employed therein.

"In view of its limitations" means nothing, as applied to the *Baltic* company, because the "limitations" in no way applied to or affected it. The *Baltic* tax was not a *fixed* tax.

Moreover, how can the presence of a limitation fail to create a *burden* on interstate commerce, when its absence would impose such a burden? Logically, the limitation has no bearing whatsoever on the question of the operation and effect of the tax, except as to mere amount.

On the contrary, the new Kansas excise on domestic corporations, which is gradated according to paid up capital, with a maximum of $2,500, was of *fixed* amounts, according to a classification of corporations based on their size or capital.

This excise was upheld, because it was a "franchise tax on the privilege granted by the State of being a corporation" (*Kansas City Ry.* v. *Kansas*, 240 U. S. 227, 235).

Mr. Justice Hughes says (p. 235):

> "It does not *fluctuate* with the volume of interstate business."

The Massachusetts *does* so "fluctuate."

It is conceivable that, by use of the phrase "in view of its limitations," Mr. Justice Hughes may have intended to imply that a $2,000 tax is only of small amount, and is, therefore, a "reasonable" excise.

If the question of amount were the only one involved, we should not argue this question, although it is apparent that a $2,000 annual excise is more onerous than the $14,000 and $20,100 *single* payments condemned in the *Western Union* cases, and that, if Massachusetts may exact it, it

may raise the tax to $10,000 or more, as has now been done under the amended statute, and that all other States may do likewise. This might amount to $500,000 per annum or more, for the foreign corporation privileges granted to corporations operating in all the States, not, indeed, an insignificant amount even for the largest corporations.

But the serious questions as to the Massachusetts tax concern:

(1) Its "necessary operation and effect," as a "fluctuating" tax, which, as applied to the present companies, necessarily "burdens" their interstate business, as the precisely similar "fluctuating" tax, under the original Kansas statute, was held to do;

and (2) its unreasonable *basis*, and not merely the size of the tax.

Nor could it be said to be a correct diagnosis of the *Baltic* decision to state that it was there held that the Massachusetts tax could not in view of its limitations be regarded as imposing a *direct burden* upon interstate commerce (*ibid.*, p. 235), whereas that phrase does not appear in the opinion, and the learned justice who delivered the opinion has repeatedly stated the correct doctrine to the effect that only a "burden," and not a "direct burden," need be shown.

> *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 86.
> *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 163.

Kansas City Railway and Pick Cases have Established a New Rule, Not Applied in the Western Union Case, but Which, Equally with Western Union Decisions, Condemns the Massachusetts Tax as Unconstitutional.

Fixed Taxes Which are Gradated According to a Classification of Corporations, as Determined and Measured by Their Size and Capital Stock, are Constitutional.

A Percentage Tax Measured by Capital Stock, Which "Fluctuates" and Rises in Exact Proportion to any Extensions of Interstate Business, as Represented by

the Capital Employed Therein, is Unconstitutional and Void.

The Massachusetts Tax, as Applied to These Companies, "Fluctuates" on the same Percentage Basis at all Stages of the Capitalization, until It Reaches $10,000,000 and then Becomes Fixed and Stationary. No Classifications and no Gradations are Attempted such as Appear in the California and New Kansas Excises.

The new Kansas statute passed in 1913, in order to remedy the unconstitutionality of the Bush Act condemned in the *Western Union* decisions (216 U. S. 1, 56), came before this Court in two recent cases. One of these cases applied to foreign corporations doing business in Kansas.

Lusk v. *Kansas*, 240 U. S. 236.

The foreign corporation excise there involved proceeds upon an undoubtedly sound basis, namely, that a foreign corporation, for the privilege of doing local business, must pay a tax determined by the proportion of its capital which is invested and used in Kansas. The statute provides, as follows:

New Kansas Excise on Foreign Corporations.

The Secretary of State determines the "proportion of the issued capital stock of the company represented by its property and business in Kansas, and shall charge and collect . . . for the privilege of exercising its franchise in Kansas, an annual fee upon that proportion of such foreign corporation's issued capital stock as is devoted to its Kansas business."

The fees are of fixed amounts imposed upon classes, and are gradated according to the amount of issued capital stock "used in Kansas" (240 U. S. 236, 237).

Such a tax is clearly constitutional, for a proper measure of the tax is adopted, indicating an intent only to tax that

proportion of the capital which represents purely local business, and to leave the interstate business and the capital employed therein wholly untouched.

Massachusetts knows how to frame a proper constitutional tax, as applied to certain classes of foreign corporations, for exactly the same principle is adopted in its taxes on railroad, telegraph, telephone and express companies, which are based on *proportionate mileage* of lines used in the State, as compared with their total lines or mileage.

Mass. Acts 1909, c. 490, Part III, Secs. 40, 41, 43, 52, 72, 76.

See

Baltic Mining Co. v. *Commonwealth*, 207 Mass. 381, 386.

This measure of excise taxation on foreign corporations has been upheld.

Western Union Tel. Co. v. *Massachusetts*, 125 U. S. 530.

The only question raised in the *Lusk* case (240 U. S. 236) was to the effect that "equal protection" was denied to foreign corporations by discrimination in favor of domestic corporations, by reason of the claim that the same Act was unconstitutional and void with respect to the latter.

This claim was held to be unsound, because the Act was upheld as to domestic corporations in *Kansas City Ry.* v. *Kansas* (240 U. S. 227), decided at the same time.

New Kansas Excise on Domestic Corporations.

According to the new Kansas Act of 1913, every domestic corporation is required to pay to the Secretary of State an annual fixed fee which is gradated according to a classifi-

cation of corporations determined and measured by the amount of their issued and paid-up capital stock.

"When" this capital stock is $10,000 or under, the fee is $10;

"When" it is between $10,000 and $25,000, the fee is $25;

Similar gradated classes are provided for, with higher fees, until a maximum fee of $2,500 is reached, applying to all corporations with a paid-up capital stock of $5,000,000 or more (*Kansas City Ry.* v. *Kansas*, 240 U. S. 227, 230, 231).

Kansas City Ry. *v.* **Kansas, 240 U. S. 227.**

This decision, upholding the above excise on domestic corporations, was rested upon well settled principles.

The Court states the reason for it thus:

> "We take it to be simply a tax on the privilege of being a corporation, — on the primary corporate franchise granted by the State.
>
> "The authority of the State to tax this privilege, or franchise, has always been recognized, and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the State's taxing power."
>
> *Ibid.*, p. 232, and cases cited.
>
> "It is also manifest that the State is not debarred from imposing a tax upon the granted privilege of being a corporation, because the corporation is engaged in interstate as well as intrastate commerce."
>
> *Ibid.*, p. 232 and cases cited.

The decision itself is of no essential importance here, but the further statements there made lead to an important distinction, which represents an addition to the principles settled by the *Western Union* decisions, but obviously has

no bearing upon the "fluctuating" Massachusetts tax, in terms precisely like the original Kansas tax, so far as it applies to the companies now before the Court.

The Court there says (p. 235):

> "It [the new Kansas excise] does not fluctuate with the volume of interstate business."

But obviously the Massachusetts tax does so "fluctuate," as applied to these companies, being upon the same percentage basis throughout, with no fixed taxes for classes, and increasing in exact proportion to whatever additions may be made to interstate business and the capital employed therein.

The new Kansas excise was not a percentage tax, but one of fixed amount for the several classes. It establishes a classification of corporations according to their size, which is measured by their paid-up capital stock.

Within each class, there cannot be any variation in the tax or any "fluctuation." The tax remains at a fixed stationary amount until the next higher class is reached.

The result is altogether different with the Massachusetts tax.

If interstate business and the capital employed therein increase by even a single dollar, the tax is automatically increased in exact proportion and upon the same percentage basis throughout, until a $2,000 tax is reached, when further taxation ceases, whereas no change or fluctuation can take place under the Kansas statute until the next higher class is arrived at, when a new *fixed* tax is exacted.

An excellent concrete illustration of the working of the Massachusetts system is afforded by an actual case now awaiting decision by the Massachusetts Court, under the new amended statute, which repealed the $2,000 limit, that of the *Locomobile* company, where facts appear which are not stated in the company's present case before this Court. It appears that the company increased its capital

stock for the sole purpose of extending its factory plant in Connecticut and its interstate business conducted from that center.

No part of this increase in capital was invested in Massachusetts or in the local business there conducted of selling repair parts and second-hand automobiles.

The domestic commerce remained wholly stationary. Solely as the result of this increase of capital, the interstate commerce was immediately expanded to a large extent.

The excise tax was, accordingly, increased in exact proportion to this increase in capital, although it was wholly employed in extensions of interstate commerce.

In such a case, the amount of the tax obviously has a direct and *necessary* relation to the amount of interstate commerce and the capital employed therein, being wholly dependent on increases therein and become greater wherever and whenever interstate capital and business expand. The amount of the tax can be determined only by taking into account such increases in interstate business.

In such a case, it would be impossible to argue that there was no *necessary* relation between the amount of the tax and interstate commerce, because the " necessary operation and effect " of such a tax is to increase the amount of it whenever interstate commerce, and the capital employed therein expand at all, even to the slightest extent. This was also the case with the tax condemned in the *Western Union* decisions.

Nor is the illustration forced or exceptional with respect to the effect and operation of the Massachusetts excise.

It must clearly be a common case with corporations engaged in expanding their interstate commerce, thus applying to practically all large companies.

Expansion of domestic commerce and increase of capital for that purpose is comparatively a rare occurrence with large interstate corporations. Their increases of capital

are, as a rule, concerned with matters other than expansion of Massachusetts domestic trading.

The tax always operates so that, if interstate business and capital expand, even to the slightest extent, the tax increases in like proportion. It " fluctuates " according to any changes in capital. That is, the " necessary operation and effect " of a tax like that of Massachusetts.

The new Kansas excise operates quite differently.

It does not " fluctuate " in this way. It remains absolutely stationary until the next higher classification is reached.

The result of the *Kansas City Railway* case may be stated thus:

Gradated taxes of *fixed* amounts on classes of corporations, where the classification is determined by the size of the corporation, as measured by its authorized or paid-up capital, are constitutional, *provided that* the tax is a *non-fluctuating* excise which is not based on the percentage system, simply because such a tax does not have the " necessary operation and effect " of " burdening " interstate commerce, thus differing from the *Western Union* and Massachusetts excises.

The difference between the several fixed taxes before the next higher class is reached may well be regarded as allowing for a considerable expansion of interstate business without additional taxation. So that it cannot be said that an additional tax is *necessarily* imposed for each expansion, however slight, of interstate business, in which case the *necessary* effect of such a system is to " burden " interstate commerce.

The classified form of excise is well illustrated by the California tax (*infra*).

Kansas City, &c., R. R. Co. *v.* Stiles, 242 U. S. 111.

This case, like *Kansas City Ry.* v. *Kansas* (*supra*), involved no question concerning excises levied on foreign corporations.

It merely reiterated the well-established doctrine that the State, in dealing with corporations of its own creation, may exact franchise taxes, license fees or excises practically at its own discretion, and may adopt, as a measure of the amount of an excise on domestic corporations, the size of the corporation, as determined by its total paid-up capital, even though that represents, in part, interstate business or foreign property not subject to State taxation.

In any event, it must be conceded that the question actually decided in those cases, involving excise taxation on domestic corporations, is not the same as that raised regarding excises on foreign corporations.

The *Western Union* decisions were not there decisive, as here, because:

(1) That decision applied to domestic corporations; while the *Western Union* cases involved foreign companies;

(2) The terms, nature and character of the tax were different, and not, as here, precisely alike;

(3) The *purpose* of State taxation, in dealing with its own corporations, is not necessarily the same as where foreign corporations are involved;

(4) The "necessary operation and effect" of the Alabama, new Kansas and California excises, were different from the original Kansas excise, because expressed in different terms.

The Massachusetts excise must have precisely the same "necessary operation and effect" as the original Kansas statute, because in precisely the same terms, particularly since removal of the $2,000 limitation. The "nature and character of the tax imposed" is exactly the same, because the terms of the statutes are identical.

The *Western Union* decisions are therefore decisive against the constitutionality of the Massachusetts statute, and particularly the present amended statute. The Alabama statute involved in the Stiles case was a classified fixed tax of one dollar per thousand on the first $50,000 of paid-up capital stock, fifty cents per thousand on the next $950,000, twenty-five cents per thousand on the next $4,000,000 and ten cents per thousand on all above $5,000,000.

This is obviously a classified tax. It does not *necessarily*, like the Massachusetts excise, exact an additional tax *for every dollar* of increased capital. It does not "fluctuate" *at all stages*, although the tax may be said to increase *for every thousand dollars.*

Mr. Justice Day says (p. 119):

> "The test of validity . . . is the *nature and character* of the tax imposed. The State may not regulate interstate commerce or impose burdens upon it; but it is authorized to levy a tax within its authority, measured by capital in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or *necessary effect* in the tax imposed to *burden* commerce of that character."

As to the effect of the *Western Union* decisions, he says (*ibid.*):

> "The tax is not of the character condemned in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, and kindred cases. In the latter case, a tax of large amount was imposed upon a foreign corporation engaged in interstate commerce for the privilege of doing local business within the State. Under the circumstances therein disclosed and the character of the business involved, this court *held that the statute was in substance an attempt to tax the right to do interstate business*, and to tax property beyond the confines of the State, and was therefore void. Here, a franchise tax is levied upon a corporation consolidated under the laws of the State by its own acceptance of that law in incorporating under it."

Here the " nature and character " of the tax imposed are identical with the Kansas tax, the terms of the statutes being exactly alike. The " necessary effect " of the statutes in *burdening* interstate commerce must, therefore, be identical. The *Western Union* decisions, unless they are to be overruled, are decisive against the constitutionality of the Massachusetts excises, both under the original and the present amended statutes.

Pick *v.* **California (Decided June 4, 1917) — California Excise.**

In this case the California form of *non-fluctuating* and *fixed* excises on classes determined and measured by capitalization was upheld by a *per curiam* decision, on the authority of *Kansas City Railway* v. *Kansas* (*supra*).

By this License Tax law domestic and foreign corporations are put on the same basis and are required to procure annually a license authorizing the transaction of business in California, upon payment of certain excises.

The system does not differ from the new Kansas tax (*supra*), but is much more elaborate with respect to the number of classes provided for.

The gradated classifications are as follows:

"*When* the authorized capital stock of the corporation does not exceed ten thousand dollars ($10,000) the tax shall be ten dollars ($10);

"*When* the authorized capital stock exceeds ten thousand dollars ($10,000) but does not exceed twenty thousand dollars ($20,000) the tax shall be fifteen dollars ($15);

"*When* the authorized capital stock exceeds twenty thousand dollars ($20,000) but does not exceed fifty thousand dollars ($50,000) the tax shall be twenty dollars ($20);

"*When* the authorized capital stock exceeds fifty thousand dollars ($50,000) but does not exceed one hundred thousand dollars ($100,000) the tax shall be twenty-five dollars ($25);

"*When* the authorized capital stock exceeds one hundred thousand dollars ($100,000) but does not exceed two hundred and fifty thousand dollars ($250,000) the tax shall be fifty dollars ($50);

"*When* the authorized capital stock exceeds two hundred and fifty thousand dollars ($250,000) but does not exceed five hundred thousand dollars ($500,000) the tax shall be seventy-five dollars ($75);

"*When* the authorized capital stock exceeds five hundred thousand dollars ($500,000) but does not exceed two million dollars ($2,000,000) the tax shall be one hundred dollars ($100);

"*When* the authorized capital stock exceeds two million dollars ($2,000,000) the tax shall be two hundred and fifty dollars ($250)."

Sec. 2 of California Corporation License Tax Law (Stats. 1905, p. 493).

The wide differences between such a system and the Massachusetts excise are apparent.

The Massachusttes tax "fluctuates" at all stages on the same percentage basis and in exact proportion to any increases, however slight, of interstate capital and business.

If interstate commerce and capital increase *at all*, an additional tax *necessarily* follows. No fixed fees are provided for and much higher taxes are exacted.

No classifications or gradated rates are attempted, except that corporations having a capital in excess of $10,000,000 are wholly exempted from further taxation.

The California excise is *non-fluctuating* within the classes named. There is a *fixed* tax for each class, and an absolutely *fixed* charge of $250 for all corporations having a capital in excess of $2,000,000.

A tax of $250 would, in Massachusetts, represent only the amount levied on a capital of $1,250,000.

The California tax has an extremely modest maximum of $250, while the Massachusetts statute had a limit of $2,000, but is now unlimited, the maximum provision having been repealed since the present cases were brought.

The Massachusetts tax is a percentage tax of "one-fiftieth of one per cent of the par value of its authorized capital stock."

Corporations are not classified, in any sense.

The exemption from further taxation of all the largest corporations, above a $10,000,000 capital, is not classification measured by capital, in the sense of the *Kansas City Railway* and *Pick* decisions.

No *fixed* amounts are payable according to gradated classes. But, when applied to all corporations below a capitalization of $10,000,000, it "fluctuates" at all stages, upon exactly the same percentage basis. The percentages are not gradated; nor are any classes created.

The California excise on the other hand establishes classified taxes of fixed amounts for the various classes, providing, in terms, that "when" the capital stock reaches a certain figure, then the specified fixed tax becomes applicable to that class.

The California statute does not single out foreign corporations, but applies the same rate of taxation to domestic and foreign corporations alike.

The old Kansas statute, condemned in the *Western Union* decisions (216 U. S. 1, 56), was precisely like the Massachusetts tax, as applied to the present companies, in that it was purely a "fluctuating" excise, which was practically on a percentage basis, that is, $200 for each additional million, as contrasted with classified fixed fees under the California statute, which exacted a *fixed* fee of $250 on all corporations having a capitalization in excess of $2,000,000.

Crane Co. *v.* Looney, 218 Fed. 260 — Texas Excise.

The contrast between a classified fixed tax, like that of California, and a "fluctuating" percentage excise as exacted under the Massachusetts system, is clearly exhibited in this case, where the Federal District Court, sitting with

three judges, decided that the Texas statute was unconstitutional, upon the ground that its effect was " to make the privilege of doing a local business in Texas subject to the condition that it should first pay to the State a given per cent of all its *capital and surplus*, representing all its property, wherever situated, and all its business, intrastate and interstate."

The attempt there to distinguish the *Baltic* decision upon the ground that the Texas tax is based on *capital and surplus*, is based upon no real distinction, for there can be no doubt that " total authorized capital stock," as provided in the Massachusetts statute, represents *all* the assets of the corporation, *including surplus*, as well as all its business, both interstate and domestic, as was expressly held in the *Western Union* decisions under the precisely similar Kansas tax.

Just like the Massachusetts tax, there can be no doubt that the Texas statute provides for a " fluctuating " tax, and the remarks of the Court are sound and equally applicable to the Massachusetts tax:

> " An imposition which is based, whether in whole or in substantial part, on the value of property outside of the State, or on interstate or foreign commerce engaged in, *so that the amount of it grows in exact proportion* to the growth of such property or commerce, is a *burden* on such property or commerce. . . . The statute in question so obviously imposes such a *burden* that it is not permissible to regard them as privilege taxes or excises, the amount of which is determined by *something not having a necessary relation* to the amount of value of things which are not subject to the State's taxing power.
>
> " The exactions being so made that the amount of them cannot be determined without taking into account the amount of property and business which are not subject to State taxation, and being *greater or less, according as such property or business is greater or less*, the *necessary effect* of the enforcement of them is to *burden* such property or business."

The same *necessary effect* results from the Massachusetts tax, as applied to the companies now before the Court. If their interstate business and the capital required therefor increase to the slightest degree, the tax *necessarily* increases. The *direct* relation between the two is *necessarily* fixed.

The amount of the tax cannot be determined " without taking into account the amount of property and business which are not subject to State taxation."

An increased tax is exacted solely *because of* an increase of interstate business and capital, *wherever* and *whenever* that may occur.

Differing from the California and the new Kansas excise, it is clear that both the Massachusetts and the Texas taxes " fluctuate with the volume of interstate business."

Kansas City Railway v. *Kansas*, 240 U. S. 227.

PRINCIPLES OF WESTERN UNION DECISIONS, SO FAR AS AFFECTED OR ADDED TO BY LATER CASES.

The *Western Union* cases (216 U. S. 1, 56) directly decided that the " necessary operation and effect " of the original Kansas excise, being measured, as it was, by capital stock, was to *burden* interstate commerce, where interstate commerce was transacted in conjunction with domestic business at the *same places* and through the *same instrumentalities*, although the tax was, in form, exacted solely for the privilege of transacting local commerce.

The *Baltic* case failed because the special facts showed that the *Baltic* company did not come within this rule, for it did not transact the two classes of commerce at the *same places* and through the *same agencies and instrumentalities*.

The maximum $2,000 limit had no application to that case, and did not affect the decision, because the companies were in no way subject to that tax, but to the " fluctuating " taxes there involved, amounting to $500 and $200 respectively. The $2,000 maximum tax had no application or

materiality except to companies capitalized at more than $10,000,000.

The Massachusetts tax, being in precisely the same form as the Kansas tax, in so far as it applies to the companies now before the Court, must have exactly the same "necessary operation and effect" in "burdening" interstate commerce.

The latest decisions do not involve "fluctuating" percentage taxes, like the Massachusetts and Kansas excises, but introduce an extension or modification of the *Western Union* doctrine, to the effect that *non-fluctuating* fixed taxes may lawfully be imposed upon classes of foreign corporations, although classified according to size, as measured by their capital stock.

Although the Massachusetts Excise, as Applied to the Present Companies, is Conclusively Condemned by the WESTERN UNION Decisions, the Same Result would Follow, under the Earlier Cases.

The *Western Union* cases, in reality, went little, if any, beyond the previous decisions of this Court. It was not revolutionary either (1) to declare that this Court always looks through forms and professions in order to reach the substance and the actual or necessary effect of a tax; or (2) to hold that the authorized capital stock necessarily represents all business of the corporation, whether interstate or local, and all its property everywhere.

The next step in the decision was not so obvious, to the effect that a condition on the right to do local business, which the State may grant or withhold, must be disregarded as a mere form, when the real effect is to burden interstate commerce.

See

Philadelphia & Southern S. S. Co. v. *Pennsylvania*, 122 U. S. 326.

Allen v. *Pullman Co.*, 191 U. S. 171.

The conclusion from these premises was irresistible, to the effect that an excise measured by capital stock *necessarily* taxes and, therefore, "burdens" every thing represented thereby, including the interstate portion of the business, and that a percentage tax measured by capital stock *necessarily* involves the result that the tax is increased wherever and whenever interstate business and capital are increased, and in such cases *necessarily burdens* interstate commerce, where there are no *fixed* taxes and no *classifications* based on mere size of the corporation, as measured by its capital stock.

The Kansas tax used authorized capital as a mere "measure" of the tax. The Massachusetts tax, as a "measure," is in precisely the same terms, so far as it applies to these companies.

The fact that the Kansas tax was merely "measured" by the amount of authorized capital stock did not save it. Nor can the same fact save the Massachusetts statute.

It is true, as stated by Mr. Justice Hughes:

> "If the tax purports to be laid upon a subject within the taxing power of the State, it is not to be condemned by the application of any artificial rule, but only where the *conclusion is required* that its *necessary operation and effect* is to make it a prohibited exaction."
>
> *Kansas City Railway* v. *Kansas*, 240 U. S. 227, 233.

That conclusion was "required" by the terms of the *Western Union* tax.

The same terms and the same "fluctuating" character of the Massachusetts tax, as applied to these companies, absolutely *require* the same *conclusion*.

II.

THE AMOUNT OF ANY FOREIGN CORPORATION EXCISE OF THIS DESCRIPTION MUST BEAR SOME FAIR AND REASONABLE RELATION TO THE VALUE OF THE PRIVILEGE OF CONDUCTING LOCAL BUSINESS. IT MUST ALSO BE LEVIED UPON SOME REASONABLE BASIS. OTHERWISE IT IS VOID UNDER THE " COMMERCE " CLAUSE.

The Court below refused to rule that the amount of an excise of this description must bear some " fair and reasonable relation " to the value of the local privilege granted by the State (4th and 5th Assts. Errors, Rec. 50).

Apart from the more fundamental questions above argued, we submit that this ruling should have been given, and that the Massachusetts excise cannot stand this test.

We submit, further, that, under the " commerce " clause, an excise of this description must be levied upon some proper and reasonable basis, or, in other words, must be a " reasonable excise."

The Massachusetts excise, as enforced, is exacted upon a wholly improper and *unreasonable basis*, and is, therefore, an *unreasonable excise*, wholly apart from its amount, which is obviously excessive and even extortionate, in many cases.

The trifling value of the local privileges, as exercised, is apparent in several of the present cases.

A $2,000 tax might be considered a reasonable amount for certain companies actually transacting a large amount of local commerce. An unlimited tax like the present statute, although not here involved, could readily be shown to be unreasonable, both in basis and amount, in practically all cases. But the basis, and not the mere amount, is the important test.

The question is, whether an excise can be said to be placed upon a proper or *reasonable basis* which pays no regard whatsoever to the nature or value of the privilege, *as exer-*

cised, to the degree or extent of its actual use, or to the benefits derived therefrom.

The Massachusetts system is frankly based on the *potential* value of the local privilege, *as granted* (218 Mass. 558, 579).

The specious answer to any criticism of this basis is that it makes no difference to the State how much or how little the privilege is *made use of*, for all foreign corporations are *granted* the power to use the local privilege as much as they please. The *grant* of power to conduct local business to any extent that it pleases, is a mere nullity, of no value, when applied to companies the business of which is wholly interstate, like the *Champion* and *Cheney* companies, or have no real business of any kind, like the *Copper Range* company.

Under this system, if the privilege is actually *used* or *exercised* only to a trivial extent, the charge is the same as if ninety-nine per cent of its Massachusetts business or activities consisted of commerce of a local nature. The same is true, if the nature of the local privilege is merely technical or of no practical value, as appears in several of these cases.

The facts here sufficiently indicate the extremes to which the Massachusetts Court has gone in these respects.

Several directors' meetings in a year (*Champion* case), the alleged copying and transmission from the Boston office of sales orders concerned solely with Connecticut business and with which Massachusetts has no concern (*Cheney* case), the local sale of emergency repair parts for machines sold exclusively through channels of interstate commerce (*Lanston* case), and local commerce amounting only to one per cent of its total sales in Massachusetts (*Northwestern* case) are each made the excuses for levying taxes running as high as $2,000 per annum in the *Lanston* case.

Under the statute, as construed by the Court below, the tax does not profess to be based upon the real value of the

local privilege or the benefits derived from the actual *exercise* thereof. It is exacted whether the privilege is used much or little, is valuable or worthless, is substantial or technical. It rests wholly upon *potentiality*, the mere possibility of its being exercised to a valuable degree, or as much as the corporation sees fit to use it.

Again (*Champion* case), the tax rests upon the mere claim that the entire corporate *potentiality* dwells in the Boston office. Its "executive offices are there" (218 Mass. 558, 579). But the company's *real business* in Massachusetts is the management of interstate deliveries, and of revenues derived solely from interstate commerce.

That the amount of an excise must bear some "fair and reasonable relation" to the value of the local privilege taxed, is clearly implied in several decisions of this Court.

Thus Mr. Justice Day says:

> "There is no suggestion in the present record . . . that the amount of the tax is *unduly great, having reference to the real value* of the property of the company within the State and the assessment made."
>
> *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335, 348.

See also

> *Fargo* v. *Hart*, 193 U. S. 490.

So also Mr. Justice Harlan remarks that a certain excise was:

> "not at all *disproportioned* to such local business and, therefore, not to be regarded as a mere *device* to reach or burden the interstate commerce of the company."
>
> *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, 42.

Even the Court below admits:

> "These tests well may be used as aids in determining whether the general scheme of an excise statute is an honest attempt to raise legitimate revenue or whether it

is ' a mere device to reach and burden the interstate commerce of the company.' "

Marconi &c. Co. v. *Commonwealth*, 218 Mass. 558, 567.

The Massachusetts statute, if upheld, may well be regarded as a successful " device " in *reaching* revenues derived from interstate commerce, certainly in several of these cases. In some of them interstate commerce necessarily pays the entire tax, or the larger portion of it. Thus, in the *Champion* case there is no *revenue-producing* local business whatsoever. Its revenue is exclusively derived from interstate commerce. In the *Lanston* case there is not sufficient domestic commerce even to pay the tax, let alone its proportion of general corporate expenses.

We do not mean to imply that the Massachusetts tax is such a " device," because of any conscious intent to evade the " commerce " clause, but because its necessary effect in many cases is to shift upon the shoulders of interstate revenues large charges for the privilege of transacting trifling amounts of domestic commerce, or, in other cases, for the local privilege of exercising technical functions and activities which are not in the nature of business at all and are not revenue producers.

This result naturally follows from the unreasonable basis adopted.

But it is wholly unnecessary to show that this tax is a successful " device " in reaching interstate revenues.

We rest upon the proposition that the system, as interpreted and administered, is founded upon a wholly *unreasonable basis*, because it rests upon *potentiality*, instead of regarding the actual *exercise*, use and value of the local privilege.

If placed upon an *unreasonable basis*, which frequently results in unequal and excessive charges, and certainly does in several of these cases, the tax is unconstitutional, because

it is " unduly great, having reference to the real value " of the local business or priviliege, and because it is wholly " disproportioned " to the amount of domestic business and the value of the privilege taxed.

We might go further and suggest that a tax of $1,400 for the local privilege of recording and transmitting copies of Connecticut selling orders having no connection with local commerce (*Cheney* case) or of $2,000 for doing perhaps $1,200 worth of local business (*Lanston* case) are not only excessive but also extortionate, the absurdity of such charges resulting simply from the adoption of an improper and *unreasonable basis*, whereby the full tax is exacted for the slightest local business, activity or function, however trivial, profitless or technical it may be, and regardless of the extent of its actual *exercise*, the real value of the privilege taxed and the benefits derived therefrom. It will hardly be contended that an excise of this description, if founded upon a wholly *unreasonable basis*, is constitutional, under the " commerce " clause.

An Excise which Operates with Inequality because of Its Improper Basis, is an " Unreasonable " Excise and Void under the " Commerce " Clause.

This excise operates *unequally* upon the different foreign corporations, because of the absence of any proper standard of value of the privilege taxed or of the benefits derived therefrom. The basis of mere *potentiality* of use necessarily produces inequality.

It operates in a palpably arbitrary way. One corporation may have a large local business. The tax may be entirely fair for it.

Another corporation of equal size pays the same tax, although only one per cent of its Massachusetts business consists of local sales (*Northwestern* case).

Another pays $1,400 for the trivial right of copying in Massachusetts and transmitting to Connecticut sales orders taken in Connecticut and involving commerce with which Massachusetts has no concern (*Cheney* case).

Another pays $500 for the technical privilege, of little value, of holding several directors' meetings concerned with the distribution of interstate revenues, by way of dividends (*Champion* case).

A holding company, having an office, but transacting no commerce at all (*Copper Range* case), is subjected to the same tax as a corporation of equal size which carries on a large amount of local commerce.

The tax is void, under the "commerce" clause, because it is an "unequal" and "unreasonable" excise exacted upon a wholly *unreasonable basis*, and is "unduly great," "disproportioned" to the value of the local privilege and bears no "fair and reasonable" relation to such value or to the benefits derivable from such privilege.

The statute might readily have been freed from these and other objectionable features, if the tax had been imposed under some reasonable rule based on the proportionate investment used in local commerce, like the sound Massachusetts system as to railroad, telegraph, telephone and express companies.

III.

ALL "FAIR AND REASONABLE INCIDENTS" TO AND ALL INSTRUMENTALITIES OF INTERSTATE COMMERCE ARE PROTECTED AGAINST STATE EXCISE TAXATION, EQUALLY WITH THE COMMERCE ITSELF. THEY NEED NOT BE "INDISPENSABLE," "REASONABLY NECESSARY" OR "INSEPARABLE" INCIDENTS OR INSTRUMENTALITIES, AS REQUIRED BY THE COURT BELOW.

The plaintiffs in error were entitled to the rulings requested, to the effect that all "fair and reasonable incidents" to interstate commerce are protected against excises of this description, equally with the commerce itself (9th ,10th and 12th Assts. Error, Rec. 51, 52).

They were also entitled to rulings that the miscellaneous functions and activities of several of these companies were "reasonable incidents" to interstate commerce (*ibid.*); also that many of these activities were equally protected as *instrumentalities* of such commerce, whether "reasonably necessary" or not.

On the contrary, the Court below took the unwarranted view that any activities or functions, although "fairly and reasonably incident" to interstate commerce, justify such an excise, unless they constitute *indispensable* and *absolutely necessary incidents* or, at least, "reasonably necessary" and "inseparable" instrumentalities, without which such commerce cannot be conducted at all.

This erroneous test was applied in each of the cases, including the *Pocahontas Fuel* case decided in favor of that company.

In that case the Court says:

> "The keeping of an office and a local bank account and the employment of a stenographer are incidental instrumentalities *reasonably necessary* to the conduct of this interstate commerce, and *hence inseparable* from it."
>
> *Marconi &c. Co.* v. *Commonwealth*, 218 Mass. 558, 569.

It would clearly have sufficed, under the authorities, to say that these were *instrumentalities*, whether "reasonably necessary" and "indispensable" or not, and, as such, protected from State excises merely because they were, in fact, used in connection with interstate commerce.

But this erroneous theory disposed of several of these cases adversely to the companies involved.

The proper view as to the extended application of the "commerce" clause is thus stated:

> "It includes the *fact of intercourse and of traffic* and the subject matter of intercourse and traffic.
>
> "The fact of intercourse and traffic, again embraces all the *means, instruments, and places* by and in which intercourse and traffic are carried on, and, further still, comprehends the act of carrying them on at these places and by and with these means."
>
> *McCall* v. *California*, 136 U. S. 104, 108.

Local Offices Used for Interstate Commerce are "Fair and Reasonable" Incidents thereto, as well as Instrumentalities thereof, and thus Become Protected from State Excises, whether They are Indispensable or Not.

A local office used for purposes of interstate commerce is protected by the "commerce" clause, whether indispensable or not, simply because it is an "instrumentality" for transacting such commerce or is a "fair and reasonable incident" thereto.

McCall v. *California*, 136 U. S. 104.
Norfolk & Western R. R. Co. v. *Pennsylvania*, 136 U. S. 114.

This settled doctrine was accepted by the Court below, as to the *Pocahontas Fuel* office, but it erroneously placed its decision upon the ground that this office was "reasonably

necessary " to interstate commerce, and " hence inseparable from it."

Marconi &c. Co. v. *Commonwealth,* 218 Mass. 558, 569.

Throughout, the Court erroneously applied the same test to *all* incidents of interstate commerce. Unless *indispensable* and *inseparable,* they were held to warrant State excises of this description.

That the *indispensableness* of an office or other instrumentality or incident of interstate commerce, has nothing whatsoever to do with its protection under the " commerce " clause, is clearly shown by the decisions next to be considered.

Indeed, it may fairly be said that nothing can be suggested which is absolutely indispensable to such commerce. Even a local office can be dispensed with and the commerce conducted through traveling salesmen.

McCall *v.* California, 136 U. S. 104.

In this case the San Francisco Municipal License Tax, assessing upon " every railroad agency twenty-five dollars per quarter," was held to be repugnant to the " commerce " clause, when applied to a railroad agent who maintained his *place of business* in San Francisco and there solicited passenger traffic, as agent for a railroad operating between Chicago and New York, but having no railroad lines in California. The agent sold no tickets. His only duty was to induce people contemplating a trip East to book from Chicago to New York over the line he represented.

The Court there definitely rejects the theory advanced in the *Baltic* and *Marconi* opinions (207 Mass. 388, 389; 218 Mass. 558, 572), to the effect that the local office must be

an *essential* or *inseparable* incident to interstate commerce, or one which may not readily be abandoned or "freely renounced," without serious injury to or effect upon interstate business. The Court says (p. 111):

> "The reply to this proposition is, that the *essentiality* of the business of the plaintiff in error to the commerce of the road he represented, is not the test as to whether that business was a part of interstate commerce. It may readily be admitted without prejudicing his defence, that the road would continue to carry passengers between Chicago and New York, even if the agent had been prohibited altogether from pursuing his business in California. The test is — was this business a part of the commerce of the road? *Did it assist, or was it carried on with the purpose to assist, in increasing the amount of passenger traffic* on the road? If it did, the power to tax it involves the lessening of the commerce of the road to an extent commensurate with the amount of business done by the agent."

Norfolk & Western R. R. Co. *v.* Pennsylvania, 136 U. S. 114.

If the *Pembina* case (*infra*) means anything more than hereinafter stated, it is directly in conflict with the *Norfolk & Western* case, and must be regarded as overruled by the later case, for the same statute was involved.

The Pennsylvania statute prohibited any foreign corporation from having an "office" in that state "for the use of its officers, stockholders, agents or employés," unless it should procure a license and pay an annual license fee of "one fourth of a mill on each dollar of capital stock which said company is authorized to have."

The statute was held unconstitutional, as applied to a foreign railroad corporation which maintained such an office in Pennsylvania. The company had no main or branch lines within Pennsylvania, but, by virtue of connections with other railroads and traffic contracts, had become

a link in a through line of road which, as a part of its business, carried freight and passengers into and out of Pennsylvania.

Mr. Justice Lamar says (p. 120):

> " What was the purpose of the company in establishing an office in the city of Philadelphia? Manifestly for the furtherance of its business interests in the matter of its commercial relations. . . . That office was maintained because of the necessities of the interstate business of the company, and for no other purpose. A tax upon it was, therefore, a tax upon one of the *means* or *instrumentalities* of the company's interstate commerce; and as such was in violation of the commercial clause of the Constitution of the United States."

This decision is directly in favor of the right of the *Champion* company to maintain an " office " in Massachusetts " for the use of its officers, stockholders, agents or employés," for its business in that State and elsewhere was exclusively interstate in character. Its office was maintained solely for the convenience, although not for the absolute necessities, of its interstate business and for handling the revenues derived therefrom.

This local office was one of the " instrumentalities of the company's interstate commerce." At least, it was a " reasonable incident " thereto.

In either event, it was protected from State excise taxation, whether it was indispensable or not. This conclusion applies equally to the *Cheney* office, which was maintained for the use of salesmen engaged exclusively in interstate sales and in the exhibition of samples in connection therewith, so far as anything was done by them in Massachusetts.

The Massachusetts statute, as applied to the *Champion* company, operates precisely as if, in the terms of the Pennsylvania statute, it had prohibited a foreign corporation engaged in interstate commerce from having an office in the State " for the use of its officers," unless it should con-

sent to pay a license fee based on its total authorized capital stock.

The Massachusetts decisions profess that the statute does not apply to companies engaged solely in interstate commerce. But the moment that an instrumentality of such commerce, like a local office, is involved, the excise is held to be collectible.

The *Champion* and *Cheney* cases, at least, must be decided in favor of those companies, unless the *Norfolk & Western* decision is to be overruled.

Pembina Mining Co. *v.* Pennsylvania, 125 U. S. 181.

In this case the same Pennsylvania statute was upheld, because no question as to interstate commerce was involved. The company was organized under the laws of Colorado "for the purpose of carrying on a general mining and milling business" in that State. Its principal office was in Colorado. It had an office in Pennsylvania "for the use of its officers, stockholders, agents and employés."

Upon the facts stated, there was nothing to indicate that the company attempted to do any interstate business in Pennsylvania. It merely maintained an office there. It did not appear whether or not it sold any of its products there for delivery outside of the State, or there superintended or managed interstate sales or deliveries, like the *Champion* company.

Whether it was engaged in interstate commerce anywhere, was not shown.

Mr. Justice Field there says (p. 189):

> "The State is not prohibited from discriminating in the privilege it may grant to foreign corporations, as a condition of their doing business or hiring offices within its limits, *provided always such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce.*"

The inapplicability of the *Pembina* case to cases where interstate commerce is involved is specially pointed out in *McCall* v. *California* (136 U. S. 104), where the Court says (p. 112):

> " This Court held [in the *Pembina* case] that the State legislation in question did not infringe upon the commercial clause of the constitution, because it imposed no prohibition upon the transportation into the State of the products of the corporation or upon their sale in the State, but simply exacted a license tax from the corporation for its office in the Commonwealth."

There was nothing whatever to indicate that the Pennsylvania office was used for interstate commerce or for purposes incident thereto in the same manner as the *Champion* office was used merely for superintending interstate deliveries and handling and distributing the revenues derived therefrom, without attempting to manage a foreign mine.

Horn Silver Mining Co. *v.* **New York, 143 U. S. 305.**

This case did not involve interstate commerce.

Chief Justice White has said regarding this case:

> " It involved no question of interstate commerce, but the right of a foreign corporation to carry on in a State a manufacturing business, without compliance with the laws of the State."
>
> *Pullman Co.* v. *Kansas,* 216 U. S. 56, 71.

Western Union Decisions expressly Upheld the Right to Maintain Local Offices for Both Classes of Commerce, in Conjunction.

While the *McCall* and *Norfolk & Western* cases (*supra*) directly uphold the right of the *Champion* and *Cheney* companies to maintain local offices for conducting or managing interstate commerce and for purposes fairly incident thereto,

exclusively, the *Western Union* decisions (216 U. S. 1, 56) went further. They held that telegraph *offices* and the like may be maintained for transacting interstate and domestic commerce in conjunction, without being subject to an excise of this description measured by capital stock.

A Local Office may be Maintained for Managing Interstate Business and Handling the Funds Derived Therefrom.

It must always be remembered that the Massachusetts Court holds that the statute exacting this excise does not apply where the *business* transacted within the State is exclusively interstate in character. But the Court below held that a local " office " could not be maintained for the purposes of the exclusively interstate business of the *Champion* and *Cheney* companies.

The *Norfolk & Western* case (*supra*), on the contrary, directly decided that a local " office " may be maintained by a foreign corporation, without subjecting it to State excises of this description.

This decision covers the *Champion* case, where the local office was maintained chiefly for the use of the treasurer in supervising interstate deliveries and handling the revenues therefrom. If the mine had been managed from Boston (and it was not), the same result would follow.

The occasional use of the office by " officers " and " stockholders " for their meetings, is equally covered by the *Norfolk & Western* decision, for the Pennsylvania statute expressly prohibited the use of an *office* for these purposes.

But the Court below says:

> " It may be an interesting question whether a foreign corporation can select any place attractive from financial, economic or other reasons, and establish there the *management* of all its interstate commerce, and seek immunity from any license for this privilege under the commerce

clause of the Federal Constitution, when there is no direct connection between such place and its interstate commerce."

Marconi &c. Co. v. *Commonwealth*, 218 Mass. 558, 578.

But this is precisely what the *Norfolk & Western* decision held to be permissible without a license or excise taxation.

The Court adds (*ibid.*) that it does not understand that the *McCall* and *Norfolk & Western* cases (*supra*) go to this extent, and follows these decisions only in the case of the *Pocahontas Fuel* and *Marconi* local offices.

In all other cases as to local offices and activities the Court follows the *Pembina* case, which either is overruled by the later *Norfolk & Western* case or does not mean what is claimed for it.

The Court, speaking of the *Champion* company, continues (p. 578):

"But it is not necessary to discuss this question nor to determine whether the exercise by the treasurer [of authority?] over the sales agent and the other instrumentalities of sale constitutes interstate commerce, . . . because apart from these considerations the *corporate activities* conducted at Boston constitute a doing of business which has no direct relation to commerce."

Now, precisely what is meant by this?

Apparently nothing beyond what the Court states:

"The entire corporate *potentiality* dwells in the Boston office. Its executive officers are there.

"The responsibility for its management as a corporation rests upon those whose headquarters are there" (*ibid.*, p. 579), [apparently neglecting the fundamental responsibility of the stockholders at the home of the corporation in Michigan].

The same might have been said in the *Norfolk & Western* case, for the use of the office by "officers" or "stockholders"

was expressly prohibited by the Pennsylvania statute, and yet the right to maintain an office for those purposes was upheld, where the *business* of the corporation was interstate.

If the treasurer's activities at the *Champion's* local office in managing interstate deliveries, and handling the revenues derived therefrom, do not warrant such an excise, it surely makes the case no stronger against our contentions, to say that the president and directors *manage* the *same interstate business* and handle the receipts therefrom, by way of declaring dividends.

The Court below was wholly inconsistent in dealing with the question of *management* of interstate business and revenues.

A foreign corporation may have at its local office a " manager who has charge of New England business," without becoming liable to this excise, as was held in the *Pocahontas Fuel* case (218 Mass. 558, 568).

But, apparently, the mere fact that it employs a higher grade of *manager* makes it liable.

If the *management of interstate business* and receipts derived therefrom is carried on by a treasurer, a president or a board of directors, such *management* makes the company liable to an excise tax, as was held in the *Champion* case.

Such a distinction cannot be supported.

Moreover, the excise does not, on its face, profess to be based on " potentiality," but on the maintenance of an " usual place of business," in the words of the statute, which is used for domestic trade or for purely local purposes not connected with or incident to interstate commerce.

It can make no legal difference, to assert that the board of directors represents the stockholders and has *potential* authority and power to manage the Michigan mine, although such authority has never, in fact, been exercised by the board or the stockholders, but has expressly been delegated, under the by-laws, to the general manager residing in Michigan (Rec. 22, 23).

The *Champion* decision rests solely on the claim that the *Pembina* case controls on this issue (218 Mass. 558, 579), rather than the *Norfolk & Western* and *McCall* decisions.

A Local Office may be Used as Headquarters for Drummers Engaged in Negotiating Interstate Sales, and Samples may there be Exhibited, without Liability to State License Fees or Excises. These are Fair, Reasonable and Ordinary Incidents to or Instrumentalities of Interstate Commerce and Consequently Protected from Taxation, even though Not Indispensable.

The chief reason given by the Court below for the *Cheney* decision rested upon the erroneous theory that "drummers," although engaged exclusively in interstate commerce, cannot occupy a local office as their headquarters or there exhibit samples in connection with the negotiation of interstate sales, without subjecting the company to State excise taxation.

The Court below quotes the dissenting opinion in *Robbins* v. *Shelby Taxing District* (120 U. S. 489, 500) as follows:

> "I cannot believe that if Robbins had opened an *office* for his business within the *Taxing District*, at which he kept and exhibited his samples, it would be held that he would not be liable to the tax."

The Court below approved this statement:

> "These words were used in a dissenting opinion. But they embody a thought by way of hypothesis which evidently was regarded as too plain to be challenged."
>
> *Marconi &c. Co.* v. *Commonwealth*, 218 Mass. 558, 570.

This *unchallenged* thought, on the contrary, has never since been attempted to be supported. It is plainly erroneous.

It is settled law that local agents engaged in interstate commerce and the foreign corporations represented by them cannot be subjected to State excises, even though they have an office or place of business in the State, and there negotiate sales by the exhibition of samples.

Rearick v. *Pennsylvania*, 203 U. S. 507.
Stockard v. *Morgan*, 185 U. S. 27.
Caldwell v. *North Carolina* 187 U. S. 622.
Crenshaw v. *Arkansas*, 227 U. S. 389.
Norfolk & Western R. R. v. *Pennsylvania*, 136 U. S. 114.
McCall v. *California*, 136 U. S. 104.

Receipts and Revenues Derived from Interstate Commerce are Protected from State Excises, whether directly or indirectly Exacted — The Deposit of Such Receipts in a Local Bank, the Handling of Them by a Local Treasurer and the Declaration or Payment of Dividends therefrom are each Matters fairly and reasonably Incident to Interstate Commerce and Cannot Properly be Made the Excuse for State Taxation, even though such Receipts might be Handled Elsewhere.

The " receipts as such derived from " interstate commerce are admittedly protected from State excise taxation.

Kansas City Ry. v. *Kansas*, 240 U. S. 227, 231.
Minnesota Rate Cases, 230 U. S. 352, 400, and cases cited.
Galveston &c. Ry. v. *Texas*, 210 U. S. 217, 227.

The revenues derived from interstate sales must ordinarily be collected in places other than the home of the corporation. Clearly, local collections are not a proper basis for such an excise.

The deposit of such funds in local banks is one of the ordinary incidents to interstate commerce, although not an

indispensable method of doing business. Like all other ordinary incidents to such commerce, the commerce might still be carried on without the conveniences arising from local collections and deposits.

Even an office is not indispensable.

Nor are stenographers, messenger boys, bookkeepers, the telephone or similar facilities.

But if local collections and deposits cannot be made the excuse for such taxation, it would seem that the handling of interstate revenues, in general, was a mere "incident" to such commerce.

If a treasurer draws checks thereon in payment of bills, or distributes funds among the stockholders, these are merely incidental uses of interstate revenues.

How is the case differentiated by the fact that distribution of dividends is by order of the directors passed at a meeting held locally?

Yet that is the chief basis for the finding against the *Champion* company. It held several directors' meetings each year, at which the only votes passed concerned the declaration of dividends out of interstate revenues, for it derived no income from any other source, its sales being wholly interstate.

This is the only kind of voting, except for mere organization, which appears ever to have taken place at these meetings.

No "management" of the Michigan mine was ever exercised by the directors or officers, authority over the same having been delegated to the general manager in Michigan.

No inferences can here properly be indulged in, because the agreed facts expressly state that "the treasurer's office in Boston is maintained and used for the purposes stated herein and *for no other purposes*" (Rec. 22).

The Court below did not profess to place the decision upon the ground of *actual management* of the mine by the

officers or directors, but supports the *Champion* excise solely on mere " potentiality," arising from the power or possibility of corporate action through the resident directors in overruling the general manager, which, of course, was possible, but it never took place, in fact.

The declaration of dividends out of interstate revenues, the only power ever *actually used* by the directors, should fairly be considered as a mere incident to interstate commerce, similar to that exercised by the treasurer in collecting, handling and distributing the same to creditors, without corporate action, which will not seriously be claimed as a proper justification for State excise taxation, for if interstate revenues cannot be handled locally, the protection of the " commerce " clause is wholly illusory.

Maintenance of a Local Treasurer's Office and Superintendence of Interstate Deliveries Furnish No Proper Basis for This Excise.

The entire *business* of the *Champion* company in Massachusetts was in connection with interstate sales and deliveries and the handling and distribution of revenue derived solely from interstate commerce.

Its mining operations were in Michigan, and were exclusively managed by the general manager residing there.

All sales were made in New York and reported to the treasurer. They all involved deliveries from the Michigan smelter and, therefore, constituted interstate commerce.

All deliveries were superintended and managed by the treasurer's office (Rec. 20, 21).

The *business* of this office consisted simply of superintendence of interstate deliveries, receiving, collecting and depositing interstate revenues and paying bills therefrom, together with the incidental bookkeeping and clerical work. The only other activities (*not business*) there conducted

were occasional directors' meetings, at which dividends were declared out of interstate revenues.

" Superintendence " is clearly a mere incident to the work of interstate deliveries. Indeed, if that were an essential inquiry, it must be held to be a " reasonably necessary " incident thereto. It is also an " instrumentality " of interstate commerce, precisely like drummers and sales agents, for without superintendence neither sales nor deliveries can be carried on in an interstate business of any considerable size.

We submit that all the local activities of the *Champion* company were " fairly and reasonably incident " to its interstate commerce, for it had no other *business*, in Massachusetts, at least.

If so, they furnished no proper basis for State excise taxation.

Certain Local Activities are Admittedly Mere Incidents to Interstate Commerce.

In the Court below the following activities were held to be " incidents " to interstate commerce where business is exclusively of that character, and to be protected from State excises (*Pocahontas Fuel* case, 218 Mass. 558, 568, 569):

1. Keeping a local *office* or *place* of business;
2. Keeping a local bank account;
3. Employment of a stenographer;
4. Having a local manager in charge of New England business;
5. Having a local office for the headquarters and use of one manager and one salesman;
6. Correspondence and telephoning from this office;
7. Making contracts and arranging charter parties;
8. Keeping at this office records of sales.

The Court placed its decision upon the mistaken ground that it must be shown in every case that such incidents are " reasonably necessary " to and " inseparable " from interstate commerce.

Yet no one of these activities is *indispensable* or *inseparable*.

The business could still be conducted and probably in the same volume, without these aids. They are conveniences, which assist in the conduct of the business. They are employed with the purpose of increasing commerce or of promoting the convenience of transacting it. If they are " fair and reasonable " incidents to interstate commerce, they should be protected from State excises, whether they are *indispensable* or *inseparable* incidents or instrumentalities or not.

Certain Local Activities were Erroneously Held Not to Entitle the Companies to Protection, because Not " Reasonably Necessary " and " Inseparable " Incidents to Interstate Commerce.

The keeping of an office and salesroom, for the headquarters and use of one office salesman and four traveling salesmen, is the chief fact relied on in the *Chency* opinion.

All sales made or negotiated in Massachusetts were deliverable from the Connecticut factory, and were, consequently, interstate commerce.

It is difficult to see how this office was, in any way, differentiated from the *Pocahontas Fuel* office, which was used by *one* manager and *one* salesman as their headquarters for the purpose of making interstate sales, " who travel to see prospective purchasers or communicate with them by telephone or letter from its Boston office " (218 Mass. 558, 569).

The exhibition of samples at this office was, as already shown, merely an incident to or instrumentality of interstate commerce.

The copying at this office of orders negotiated in Connecticut (if there were any such cases) and the forwarding of such orders to the home office in Connecticut, are purely technical, if not trivial excuses for local taxation, where the real business transacted in Massachusetts consists exclusively of interstate sales (*Cheney* case).

Such occasional and trifling use of an office, if it could properly be guessed at from the mere statement that the salesmen "cover" New England, could not fairly be held to constitute a *business*.

Nor could it render the office an "usual place of business" for these inconsequential purposes, or constitute a proper and reasonable basis for a $1,400 excise.

The *Lanston* case presents the question whether the local sale of emergency repair parts is not *fairly and reasonably incident* to sales of machines made exclusively through channels of interstate commerce.

This company sells a typesetting machine for use largely by newspaper plants. This business, as conducted at its Boston office, was exclusively interstate, no stock of machines being kept there (Rec. 12).

It has a local stock of emergency duplicate parts to repair breaks (Rec. 12), valued at $1,000. "Any repair parts that are not immediately needed are supplied from Philadelphia" (Rec. 12).

If emergency duplicate parts were not kept at hand, a newspaper plant would have to shut down for several days until the broken part could be replaced from Philadelphia.

Naturally, customers will not buy such a machine, other kinds being obtainable, unless emergency parts are here kept for sale, even at a loss to the company from such local business.

If it foregoes the local sale of these repair parts, obviously the amount of its interstate trade must suffer *directly* and *intrinsically*, involving not merely the loss of extra profits to be derived from local sales, or of benefits to be derived

from " economies of management " or from " advertising advantages," as suggested by the Court (218 Mass. 558, 572).

The Record states that the " keeping of this stock here is an inducement to customers to buy the petitioner's machines " (Rec. 12), that is, tends to increase its interstate commerce. On the other hand, " the abandonment of it would deprive them of that advantage over their competitors " (Rec. 12).

From the point of view of prospective customers, it is evident that they must have these parts ready at all times for emergency use. It is a *practical necessity* of the interstate business that such parts be kept on hand. The Court holds that " there is no *necessary* or *inherent* connection " between the interstate commerce and the keeping here of emergency parts, adding that " because the interstate commerce may not be profitable except in connection with local business does not so interlock the two that they are inseparable " (218 Mass. 558, 572).

The question here is not one of *profit*, at all. If, as is fairly inferable, the interstate business cannot be conducted at all, or would be seriously handicapped by the failure to keep emergency parts, there is a *practical necessity* for conjoining the two classes of business. There is, we submit, a " necessary or inherent connection " between them, even if that were an important inquiry.

The company is not " free to renounce " the local business, except at a serious loss to its interstate commerce, even if that were the proper test.

If renounced or abandoned, a direct and serious injury to the interstate business would follow. In the *Lanston* case we submit that the keeping of emergency parts was *fairly and reasonably incident* to its interstate commerce or an instrumentality thereof, and, consequently, cannot serve as a warrant for this excise.

Similar considerations apply in the *Locomobile* case (Rec.

13), where it would seem that the repair business on its own make of cars, the taking of secondhand cars, in part payment for new cars sold, and the resale of the same, are matters *fairly and reasonably incident* to the conduct of its *main* business in Massachusetts, which is the sale of machines in channels of interstate commerce.

Cf. *Banker Brothers* v. *Pennsylvania*, 222 U. S. 210.

The Record shows that the abandonment of each of these departments of local business "would seriously impair its sales of new cars" (Rec. 16), that is, *directly* and seriously injure and *burden* its interstate commerce, instead of merely causing it to lose the profits derivable from local commerce.

Copper Range Case a Special One, because That Company was Not Engaged in Commerce of Any Kind. The Excise, as Applied to It, is Void under the "Due Process" Clause.

The *Copper Range* company is a holding company owning shares in the *Champion* company, a Michigan corporation, and also lands in Michigan.

It transacts no commerce of any kind and owns no property in Massachusetts. Three or four directors' meetings in the course of a year are held in Boston at the office of the *Champion* company, where it keeps its books and records.

It receives and deposits dividends from its holdings in the *Champion* company, and from them pays dividends on its own shares.

The *Western Union* decisions, entirely apart from the "commerce" clause, held that the "necessary operation and effect" of the Kansas excise was to tax property outside the limits of the taxing State, inasmuch as the total capital stock represented the property of the corporation everywhere, both within and without the State. If so, the Massachusetts excise, in precisely the same terms (so

far as it has application to the *Copper Range* company), must have exactly the same "operation and effect." In effect, it taxes shares in foreign corporations and lands in another State, property not subject to the authority of the taxing State, where the taxpayer is a non-resident.

As applied to this company, the excise is unconstitutional, because it contravenes the "due process" clause, as applied in the *Western Union* decisions.

IV.

"Equal Protection of the Laws" Clause.

The Massachusetts Excise Denies "Equal Protection" to the White Company, within the Doctrine of Southern Railway Co. *v.* Greene (216 U. S. 400).

The *White* company excise contravenes the "equal protection" clause, within the direct authority of *Southern Railway Co.* v. *Greene* (216 U. S. 400).

This case decided that a new or additional excise cannot constitutionally be imposed on a foreign corporation by a discriminating method not employed as to domestic corporations of the same kind, *provided* that it has already entered the State, by its permission, under the existing tax system, has paid license and property taxes and acquired a "permanent property" investment.

The requirements, under this decision, are:

(1) The tax must be an additional excise imposed after the original admission to the State of a foreign corporation subject to or upon the faith of the terms prescribed and the tax system then in vogue.

(2) The foreign corporation must have acquired a "permanent property" investment under the preëxisting tax system.

(3) Under such circumstances, "equal protection" requires that additional excises should be imposed without discrimination upon all corporations, domestic and foreign, engaged in the same kind of business.

(4) That, while reasonable classification is always permissible, under the "equal protection" clause, it must be based upon some "real and substantial distinction"; and that the distinction between domestic and foreign corporations, under these circumstances, is merely "fanciful" and palpably arbitrary.

(5) That, while a railroad company was here involved, the Court said nothing to indicate that the doctrine was confined to railroads.

Nor can any reason be suggested why it should be so confined.

All foreign corporations which have acquired a "permanent property" investment in the State come within the principles announced and are entitled to "equal protection of the laws."

The "discriminatory" additional excise here involved was imposed on foreign corporations in 1907.

The 1903 system of taxation placed all corporations, both domestic and foreign, on an equality with respect to the power to deduct property taxes from the amount of their excises.

Under the 1907 statute, (1) this power was repealed as to foreign corporations, but retained and is still possessed by domestic corporations; and (2) in addition, the tax was doubled as to foreign corporations.

No similar changes were then or later made with respect to domestic corporations engaged in precisely the same kind of business.

The only material inquiry is whether the 1907 additional tax was discriminatory and *unequal*, within the meaning of the *Greene* doctrine, as applied to a company which had

previously acquired a "permanent property" investment within the State under the preëxisting tax system.

The systems of taxation of foreign and domestic corporations and individual conditions vary so widely, under the Massachusetts system, that it would be impracticable and even hopeless to attempt a comparison, for the purpose of determining whether foreign corporations now bear a greater burden of taxation than domestic companies, or whether they were taxed too lightly before the change in 1907. Such a comparison is purely speculative and was not made in or required by the *Greene* doctrine. For the discriminatory feature, there claimed, as well as here, consisted in the fact that the additional tax was levied on foreign corporations, without at the same time exacting a similar tax on domestic corporations engaged in the same business.

The only question was whether this discrimination was based on a proper and reasonable classification, and it was held that it was not. The Record here contains no material for a comprehensive comparison of the two distinct tax systems prior to 1903 and thereafter.

But, if it were a material inquiry, it can readily be shown by a general comparison that, under the system of 1903, foreign corporations were not favored in any respect, and that the additional tax of 1907 clearly was not imposed for the purpose of remedying an inequality then existing in favor of foreign corporations, but solely with a view to increasing the tax burden on them.

The general scheme of the Massachusetts tax system is to assess local real estate and machinery taxes on both classes of corporations, the same being paid to cities and towns. (Mass. St. 1909, Chap. 490, Part I, Secs. 2, 3, and Sec. 23, clauses 1, 2.)

In addition, foreign corporations pay local taxes on "merchandise" (*ibid.*), which is interpreted to cover all tangible personal property within the State. It is assumed

that they pay taxes elsewhere on their property outside the State.

Domestic corporations pay no taxes directly on their "merchandise" or intangible personalty. They do, however, pay a "franchise" tax, in the nature of an excise, on the market value of their issued capital stock (this representing, in effect, its personal property), deducting therefrom taxes on local real estate and machinery as well as on foreign real estate and other property. In effect, only their net personal estate is covered by the franchise tax, as their indebtedness is allowed to be deducted in arriving at the market value of the shares.

But the stockholders of a domestic corporation are totally exempted from taxation, local or otherwise, on the value of their shares.

The stockholders in a foreign corporation are not so exempted.

The foreign corporation pays an excise tax on the par value of its authorized capital stock, whether issued or not, but since 1907 is not allowed to deduct its local property taxes on real estate, machinery and merchandise, while domestic corporations may deduct the same.

Under the 1903 system (in 1916 changed to an income tax) the Massachusetts shareholders in foreign corporations were liable to local taxation on the full market value of their shares at rates fully equal to those paid by domestic corporations for franchise taxes, which are determined by the average rate of local taxes throughout the State (St. 1909, c. 490, Part III, Sec. 43).

It might seem, at first sight, that franchise taxes on domestic corporations are at a high rate as compared with the foreign corporation excise, the franchise tax averaging about $18 per thousand, or $1\frac{8}{10}$ per cent, as against one-fiftieth of 1 per cent.

But the apparent discrepancy is largely, if not wholly, counterbalanced by the consideration that the stockholders

in a domestic corporation escape direct taxation, completely being taxed through the corporation, which itself pays the tax; whereas Massachusetts stockholders in foreign corporations pay taxes on the full value of their shares. Thus shares in domestic corporations are taxed through the corporation. Shares in foreign corporations held by residents are taxed locally. Those held by non-residents are not within the jurisdiction of the taxing State and presumably are taxed elsewhere.

The franchise tax on domestic corporations is in lieu of taxation of the shares in the hands of individuals.

The excise paid by the foreign corporation is purely an *additional* tax, which finds no counterpart in the franchise tax on domestic corporations.

This system prevailed in 1903, under which the *White* company entered the State, paid taxes and acquired a valuable "permanent investment" in real estate, the local taxes on which were deductible from its excise tax under this provision:

"But it may deduct from such tax the amount of taxes upon property paid by it to any city or town in the Commonwealth during the preceding year" (Mass. Sts. 1903, Chap. 437, Sec. 75). A domestic corporation then had the same privilege (*ibid.*, Sec. 72), and still has the right to deduct from the market value of its shares the value of its "real estate, machinery," non-taxable securities and "the value of its property situated in another State or country and subject to taxation therein" (Sts. 1909, Chap. 490, Part III, Sec. 41, clause 3; see also Sec. 43).

In 1907 (St. 1907, Chap. 578; St. 1909, Chap. 490, Part III, Sec. 56) this privilege was repealed, as to foreign corporations, but retained for domestic corporations engaged in precisely the same line of business as the *White* company or other foreign corporations.

At the same time the rate of the excise was doubled.

No similar changes were then or later made in the excises levied on domestic corporations.

It may be admitted that a State is under no obligation to treat foreign and domestic corporations alike, with respect to taxation, at the outset. But when a tax system has become established and a foreign corporation has been duly admitted to the State, paid all required fees and taxes and has acquired a " permanent " investment in the State upon the faith of or under the existing system, an *additional* excise cannot arbitrarily be exacted from it, unless at the same time similar changes are made as to domestic corporations engaged in precisely the same business, because this is classification based on an immaterial, " fanciful " and arbitrary distinction.

And so the *Greene* case decided.

In the *Baltic* case, the *S. S. White Dental Manufacturing* company failed to bring itself within this doctrine *simply because* it failed to show " an acquisition of *permanent property*, such as was shown in the *Greene* Case."

Baltic Mining Co. v. *Massachusetts*, 231 U. S. 68, 88.

This was entirely true, because the only investment of that company in Massachusetts consisted of a trifling amount of leasehold fixtures installed under a short lease. This *temporary* investment is not in the same class with a *permanent* purchase of buildings and real estate, costing, with their improvements, nearly $300,000 and used for the special and peculiar purposes of an automobile garage and service station.

The sole question is whether this class of property constituted an investment in " permanent property," within the meaning of the *Greene* decision.

This was the only question considered by the Court below in deciding against the *White* company.

It was assumed that the agreed facts clearly indicated

that this investment was completed before the changed basis of taxation was adopted in 1907.

This finding of facts by the Court below would seem to be binding on this Court, as the case was decided upon this basis and the real question was decided on its merits, without attempting to take refuge in a technical mistake in the agreed facts, where it is stated that the investment in land and buildings was acquired between 1903 and the date of the reënactment or codification of the statute in 1909, whereas the agreed facts should have named 1907, the correct date of original passage of the statute in the same form (St. 1907, Chap. 578).

It is submitted that the substantial question should be decided, as was attempted by the Court below, without rectification of this inconsequential error. It is fairly to be inferred from the agreed facts that this " permanent " investment, whenever completed, was acquired under the preceding tax system of 1903, as the Court below treated the matter.

The Court apparently thought that the *Greene* doctrine is confined to railroads and the like.

There is nothing to indicate this in the *Greene* opinion.

Nor is there anything in the language of the opinion, to warrant the refinements to which the plain phrase, " permanent property," is subjected in the *Marconi* opinion.

It is erroneously interpreted to mean a " kind of property, ownership of which is inherently necessary for the establishment of the business, which must abide in the same ownership, and which cannot in the nature of things be sold in the general market so as to yield a fair return for the cost, less its normal depreciation " (*Marconi &c. Co.* v. *Commonwealth*, 218 Mass. 558, 580).

According to this definition, that plain and simple phrase embraces within itself a pretty extensive and elaborate set of considerations, no one of which is mentioned in the *Greene* opinion.

We respectfully submit that it means nothing of the kind, but simply what it says upon its face, — a " permanent " property investment, whether in real estate or some other fixed form, as opposed to a fleeting, movable, changeable or trifling investment, like the temporary leasehold fixtures in the *S. S. White Dental* case.

Equally untenable are the further refinements, to the effect that the words, " permanent property," imply that it must be " property of a nature irretrievably devoted to a limited and monopolistic use, and not readily available either for other valuable uses or to other persons ready to devote it to the same uses at prices fairly equivalent, subject to the general vicissitudes of business conditions, to the original investment " (*ibid.*, 580).

If this were the proper test, it is a matter of common knowledge that railroad lands and rights of way, when abandoned, are frequently sold for more than cost. They are fully as salable without loss as any manufacturing plant devoted to a special use. It is fairly to be assumed that railroad property can be sold to other railroads as readily as garages can be disposed of to other dealers.

The *Greene* decision contains no hint that the doctrine is confined to railroads or " monopolistic " uses.

Kansas City R. R. Co. v. *Stiles* (242 U. S. 111) did not involve any *additional* excise. *At the outset*, the State is not obliged to tax foreign and domestic corporations precisely alike, for " there is no denial of equal protection of the laws because a State may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the State than it applies to its own corporations upon the franchise which the State grants in creating them."

The Court here states the scope of *Southern Ry.* v. *Greene*, all the facts and conditions stated being present in the *White* case:

"In that case, a foreign corporation, complying with the laws of Alabama, entered upon business within the State, paid both license and property taxes imposed by the laws of the State, and when it was attempted to impose upon it *another* tax for the privilege of doing business in the State, a business in all respects like that done by domestic corporations of a similar character who were not subjected to the *additional* tax complained of, it contended that it was denied equal protection of the law, and this Court so held."

Facts Bringing the White Company under the Greene Doctrine.

"After 1903 (when St. 1903, Chap. 437, Sec. 75, was in force) and before 1909" (218 Mass. 558, 579), the *White* company acquired land at 341 Newbury Street in Boston, and built thereon a seven-story building made of brick, concrete and steel, with wide floors, no posts and very heavy steel construction, specially adapted for use as a garage. This building had two corner elevators, and below the first floor were installed three 500-gallon gasoline tanks, and on the first floor was a turntable. The cost of this investment approximated $175,000 (Rec. 19).

This company also acquired, at a cost of $100,000, buildings and about 7,000 square feet of land at 320 Newbury Street in Boston, which were then used as a boarding stable and were altered and remodeled by the company for a service station, at a cost of $22,000.

The partitions were removed, the floors were strengthened by heavy steel and concrete construction, the building was made fireproof, and gasoline tanks and elevators were placed in the building, in order to make it peculiarly adapted for the use of automobiles.

Not only was the "garage" specially constructed, but it had some very peculiar features, quite different from buildings adapted for ordinary real estate uses, like gaso-

line tanks and turntables. If converted to other uses, these special features would have to be eliminated at great expense.

The fact, unduly insisted on by the Court below, that the automobile business is a "widespread business," and the assumption that "such establishments are frequent subjects for lease and sale," do not seem to militate at all against the obvious fact that these buildings were of peculiar construction, particularly adapted for their special uses and not readily convertible to other uses, except at considerable expense.

Although its land may be "readily salable," it requires no evidence to show that a *building* so peculiar in construction could not ordinarily be sold for other uses at its original cost, less depreciation, because the purchaser must, at least, take into account the necessary cost of altering the building over to one adapted for mercantile, manufacturing or other ordinary uses of real estate. The expense for conversion to such uses is fully equal to that involved in the sale of a railroad station for other purposes.

The only way to save the constitutionality of the statute, is to hold that the *Greene* doctrine applies only to railroad or similar companies. But the doctrine is of general application. No valid reason can be suggested why it should not apply to all classes of foreign corporations.

By the exaction of a very much more onerous excise on this company, in addition to its property taxes and its existing excises under the statute of 1903, the *White* company was denied "equal protection" and discriminated against, under a "fanciful" classification based on an immaterial distinction.

The practical results of the new excise, so far as this company is concerned, are as follows:

Under the additional excise of 1907, this company annually pays one-fiftieth of one per cent on the par value of its authorized capital stock, the tax amounting to $600.

Under the previous tax system of 1903, this company was assessed for one one-hundredth of one per cent, or $300, less the amount of local property taxes paid by it.

Local taxes on property valued at $275,000 [averaging about $17 per thousand in Boston] would amount to $4,675 per annum. Consequently, under the preceding tax system, this company was liable to no taxation whatsoever, by way of an excise.

In 1907, the privilege of deducting property taxes having been repealed, this company's excise is raised from absolutely nothing to $600 per annum.

We submit that this excise comes within the *Greene* doctrine:

(1) Because this company had acquired an investment in " permanent property," under the preëxisting tax system of 1903.

(2) Because an onerous addition to its excise was imposed in 1907 by repealing its right to deduct local property taxes from the amount of its excise, besides doubling the rate, whereas no similar additional excises were exacted from domestic corporations engaged in precisely the same business.

The excise is based upon an improper and wholly arbitrary classification, and is, therefore, unconstitutional and void, because it denies " equal protection of the laws."

V.

The Massachusetts Excise Denies "Equal Protection of the Laws" to all the Smaller and Poorer Corporations having a Capitalization less than $10,000,000, because They are Discriminated Against by the Exemption from Taxation of Capital beyond that Amount.

This excise discriminates arbitrarily against all corporations having a capitalization less than $10,000,000, by totally exempting from taxation capital in excess of that amount. The larger corporations are favored solely because of their size and wealth.

We submit that this is palpably arbitrary classification, without any reasonable basis for distinction.

Such an excise, therefore, denies "equal protection of the laws," and is unconstitutional and void.

The exemption of the greater portion of the capital of rich corporations reverses the universal rule of legislation under Income and Inheritance tax laws, whereby the greater burden is placed on the richer classes, which are best able to stand the increased burdens of taxation.

Here, on the contrary, the richer corporations are totally exempted from taxation above a $10,000,000 capitalization. They are taxed one-fiftieth of one per cent on that amount, or $2,000 as a maximum.

The distinction is plainly based on mere size and wealth. This is palpably arbitrary classification, without any reasonable basis.

Under the "equal protection" clause, any classification "must be based upon some *real and substantial distinction, bearing a reasonable and just relation* to the things in respect to which such classification is imposed; and classification cannot be *arbitrarily* made, without any *substantial* basis."

Southern Railway Co. v. *Greene*, 216 U. S. 400, 417.
Gulf, Colorado &c. Ry. v. *Ellis*, 165 U. S. 150.
Ohio Tax Cases, 232 U. S. 576, 590.

As stated by Mr. Justice Holmes:

"It is true, no doubt, that where size is not an index to an admitted evil, the *law cannot discriminate between the great and small.*"

Engel v. *O'Malley*, 219 U. S. 128, 138.

See

Quong Wing v. *Kirkendall*, 223 U. S. 59, 64, 65.

VI.

THE CHAMPION COMPANY WAS NOT ENGAGED IN DOMESTIC "BUSINESS" IN MASSACHUSETTS, NOR DID IT MAINTAIN AN "USUAL PLACE OF BUSINESS" FOR PURPOSES OTHER THAN INTERSTATE COMMERCE, BECAUSE OF THE MERE FACT THAT IT HELD SEVERAL DIRECTORS' MEETINGS AT ITS LOCAL OFFICE, WHERE THE REAL "BUSINESS" WAS EXCLUSIVELY INTERSTATE IN CHARACTER.

The *Champion* case was decided by the Court below, not upon the ground that any domestic commerce was transacted at the Boston office, for its "business" was exclusively interstate, nor upon the ground that local supervision and management of interstate sales or deliveries would justify State excise taxation, but exclusively upon the ground that the holding of several directors' meetings at which dividends were declared, combined with the fact that its president, treasurer and certain directors resided in Massachusetts, constituted the transaction of domestic "business" and the maintenance of an "usual place of business" for purposes other than interstate commerce.

The Court rests its opinion upon corporate action or the "potentiality" of such action in Massachusetts. Under this statute exacting an excise from all foreign corporations

having an " usual place of business " in Massachusetts, we submit that what is referred to is the *real business* which the corporation is authorized by its charter to carry on, and that the mere maintenance of the corporate organization, stockholders' meetings for election of officers or directors' meetings for declaration of dividends cannot constitute the doing of " business."

This construction was given to the phrase " doing business in this State," under the New York statute, where the Court said:

> " We are not prepared to hold that . . . keeping an office where *meetings of directors* are held, transfer books kept, *dividends declared and paid*, and other business merely *incidental* to the *regular business* of the corporation is done — would bring a corporation within this act."
>
> *People* v. *Horn Silver Mining Co.*, 105 N. Y. 76.

A similar question was put and answered in the negative by the New York Court thus:

" Does a corporation which has an office in this State, from which its officers give some directions for the management of its corporate business, all of which is done elsewhere, carry on its corporate business in this State, any more than an individual carries on his business in this State who is engaged in the business of building a railroad in another State, over which he exercises some control by correspondence from his home here? "

People v. *Equitable Trust Co.*, 96 N. Y. 387.
Bradley v. *Wauhegan &c. Co.*, 113 Ill. App. 600.
Honeyman v. *Colorado &c. Co.*, 113 Fed. 96.
Kilgore v. *Smith*, 122 Pa. St. 48.

This Court has held that the maintenance of the corporate organization of a leased company, combined also with collection of rentals from the lessee, does not constitute the

doing of "business," within the meaning of the Federal Corporation Excise law.

United States v. *Emery &c. Co.*, 237 U. S. 28.
Von Baumbach v. *Sargent Land Co.*, 242 U. S. 503, 516.
McCoach v. *Minehill Ry. Co.*, 228 U. S. 295.

The Federal courts in New York have decided that holding companies which merely exercise control over subsidiaries by stock ownership, by issuing proxies, controlling meetings, and electing officers, and receive and declare dividends, are not engaged in "business" under the above law.

Butterick v. *United States*, 240 Fed. 539.
United States v. *Nipissing Mines Co.*, 206 Fed. 431.

SUMMARY OF COMPANIES' CLAIMS, AS ESTABLISHED.

We submit that the following propositions have been established:

1. The Massachusetts foreign corporation excise is unconstitutional and void under the " commerce " clause, as applied to the present companies, within the direct authority of the *Western Union* decisions (216 U. S. 1, 56), because it is a " fluctuating " tax which necessitates the payment of an additional tax for every dollar's increase of capital employed in extending interstate commerce.

2. Percentage taxes measured by capital stock, which rise in exact proportion to increases of interstate business and of the capital required therefor *necessarily* have the effect of burdening interstate commerce, for these reasons:

(*a*) *Wherever* and *whenever* capital is increased for purposes of extension of interstate commerce, the tax rises in exact proportion.

(*b*) The amount of the tax cannot be determined without taking into account the amount of interstate business and capital, for it is greater or less according as such business and capital are greater or less.

The amount of the tax, therefore, has a *necessary* relation to matters not subject to State taxation.

(*c*) The " necessary effect and operation " of such a tax is to " burden " interstate commerce, by increasing the tax *wherever* and *whenever* additional interstate capital, representing increased interstate business, is employed.

(*d*) Capital stock represents the entire business, both interstate and domestic. Consequently, a percentage tax measured by capital stock taxes and burdens everything

represented thereby, including the interstate portion of the business.

3. The *Western Union* doctrine applies to all cases where interstate and domestic business are transacted in conjunction at the same places and through the same instrumentalities.

4. The *Baltic* case (231 U. S. 68) does not apply, because domestic and interstate transactions were not there conducted at the *same places* and through the *same instrumentalities*, but wholly apart from each other.

5. The " fluctuating " percentage tax of Kansas was held in the *Western Union* decisions to have the " necessary operation and effect " of burdening interstate commerce.

The Massachusetts excise, " fluctuating " in the same way, and in exactly the same terms, as applied to these companies, must have precisely the same " necessary operation and effect."

6. A tax " fluctuating " within certain limits must have exactly the same " necessary operation and effect " as a " fluctuating " tax without limit.

7. The " necessary operation and effect " of this excise upon the present companies are in no wise affected by the consideration that other corporations, above a $10,000,000 capitalization, are exempted from further taxation.

8. It is wholly immaterial to these companies that certain other corporations, not before the Court, are subjected to a different form of taxation, namely, a fixed tax of $2,000, when they have arrived at a $10,000,000 capitalization, whereas the tax on these companies " fluctuates " on a percentage basis at all stages and never becomes a fixed or a classified tax, like that of California.

9. It may be conceded that fixed taxes in various forms are constitutional:

(*a*) Where a fixed license fee is exacted from foreign corporations for the privilege of transacting domestic business.

(*b*) Where a fixed fee is charged the various corporations,

which is gradated according to a classification determined by their size or the amount of their capital stock.

The California excise may be termed a " classified fixed tax."

Under such classification, interstate capital might be increased by nearly $1,000,000, without producing any effect in increasing the tax, which is not changed until the next class, involving a higher *fixed* tax, is reached.

All of the above forms of *fixed* taxes, however, are wholly differentiated from the " fluctuating " percentage Massachusetts tax, amounting to one-fiftieth of 1 per cent of the entire authorized capital stock of each of the present companies. Here, if one dollar is added to the capital employed in interstate business, the *necessary* effect of the " fluctuating " percentage tax is to increase the amount of the excise.

The *Kansas City Railway*, *Stiles* and *Pick* decisions relate to *classified fixed* taxes, and not to " fluctuating " percentage taxes. They are of no importance here.

The *Western Union* decisions, on the other hand, cover "fluctuating " taxes, and are decisive here.

10. The principles of the *Western Union* decisions apply equally well to trading companies, and are not confined to *quasi*-public corporations.

It is of no consequence that a foreign corporation may voluntarily abandon its domestic business without serious injury to its interstate commerce.

The *dictum* in the *Adams* case must be regarded as overruled by the *Allen* and *Western Union* decisions.

11. All " fair and reasonable " incidents to or instrumentalities of interstate commerce are protected by the " commerce " clause, equally with the commerce itself. Such protection is not confined to " indispensable," " reasonably necessary " or " inseparable " incidents or instrumentalities.

12. All the local functions and activities of the *Champion*, *Cheney*, *Lanston* and *Locomobile* companies were " fair and

reasonable incidents " to or instrumentalities of interstate commerce.

13. All foreign corporation excises must bear some fair and reasonable relation to the value of the local privilege granted. If disproportioned, unduly great or levied upon an unreasonable basis, they are void under the " commerce " clause.

The Massachusetts excise is levied upon a wholly unreasonable basis, the *potentiality* of use of the local privilege, rather than upon the *actual use* or *exercise* thereof and the benefit derived therefrom.

In the *Cheney*, *Champion* and *Lanston* cases the local privileges, *as exercised*, are so technical or trivial that the taxes paid are plainly excessive, if not extortionate.

14. Within the direct authority of *Southern Railway* v. *Greene* (216 U. S. 400), this excise is void, as applied to the *White* company. It denies " equal protection of the laws " for these reasons:

(*a*) This company had already been permitted by the State to enter within its limits and to acquire a " permanent property " investment, under the sanction of the existing tax system of 1903.

It had paid the required license fee for admission to the State ($25), excises under the Statute of 1903 and large property taxes.

(*b*) After this " permanent " investment had been acquired, onerous additional taxes were levied on foreign corporations by the new system of 1907 (now St. 1909, Chap. 490, Part III, Sec. 56), whereby their right to deduct local property taxes was repealed and at the same time the rate was doubled.

(*c*) No similar changes were then or thereafter made with respect to domestic corporations engaged in precisely the same lines of business, which still retain the right to deduct local property taxes from the amount of their excises.

(*d*) An arbitrary discrimination was thereby created in

favor of domestic as against foreign corporations, thus denying to the latter " equal protection of the laws," because the classification is founded on an immaterial, " fanciful " and palpably arbitrary distinction, without any reasonable basis.

15. This excise also denies " equal protection of the laws " to all companies having a capitalization less than $10,000,000, because of the exemption from further taxation of all capital beyond that amount.

A discrimination based on mere size and wealth, whereby those more capable of standing the burden of additional taxation are totally exempted beyond that amount wholly reverses the usual course of legislation, and constitutes palpably arbitrary classification, without any reasonable basis, thus denying " equal protection " to the smaller and poorer corporations.

16. The holding of directors' meetings at a local office, otherwise used only for purposes of interstate commerce, at which dividends were declared, does not constitute the transaction of " business " or render the office an " usual place of business " for purposes of domestic commerce, within the meaning of the Massachusetts statute. Accordingly, the *Champion* company's tax was unauthorized by the statute, because its real " business " in Massachusetts was wholly confined to the management of interstate deliveries and the handling of revenues derived therefrom.

17. Within the direct authority of the *Western Union* decisions, the " necessary operation and effect " of this excise was to tax property outside of the State, because the total capital stock represents its property everywhere, both within and without the State.

This excise is, therefore, unconstitutional and void, as applied to the *Copper Range* company, because it takes its property in violation of the " due process " clause.

We respectfully submit that the several decrees should

be reversed and decrees ordered to be entered in favor of all the plaintiffs in error (and if not all, for some of them) for the return of the taxes severally claimed by them, together with interest and costs, in accordance with the terms of the report, in view of the errors shown in refusing requests for rulings (Rec. 4).

CHARLES A. SNOW,
WILLIAM P. EVERTS,
Counsel for Plaintiffs in Error.

Office Supreme Court, U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 53 12

CHENEY BROTHERS COMPANY ET AL.
Plaintiffs in Error

v.

THE COMMONWEALTH OF MASSACHUSETTS.

In Error to the Supreme Judicial Court of the State of Massachusetts.

BRIEF FOR PLAINTIFFS IN ERROR.

CHARLES A. SNOW,
WILLIAM P. EVERTS,
Counsel for Plaintiffs.

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 314.

CHENEY BROTHERS COMPANY ET AL.
Plaintiffs in Error,

v.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

BRIEF FOR PLAINTIFFS IN ERROR.

CHARLES A. SNOW,
WILLIAM P. EVERTS,
Counsel for Plaintiffs.

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" NECESSARY EFFECT " AND OPERATION OF AN EXCISE, OR OF THE MEASURE OF AN EXCISE, IS THE ESSENTIAL INQUIRY REGARDLESS OF THE FORM OF THE EXCISE. THE " NECESSARY EFFECT " AND OPERATION OF THIS TAX, MEASURED BY THE ENTIRE AUTHORIZED CAPITAL STOCK, IS TO BURDEN THE INTERSTATE COMMERCE OF THE COMPANY, BECAUSE THE CAPITAL STOCK REPRESENTS THE WHOLE BUSINESS, BOTH INTERSTATE AND DOMESTIC, AND ALL THE ASSETS EVERYWHERE. AND THIS WAS EXPRESSLY DECIDED IN THE WESTERN UNION CASES TO BE THE " NECESSARY EFFECT " OF THE KANSAS STATUTE IN PRECISELY THE SAME TERMS 86

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X.

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Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 314.

CHENEY BROTHERS COMPANY ET AL.,
Plaintiffs in Error,

v.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

The main question is whether the Massachusetts foreign corporation excise, measured by the total authorized capital stock, is constitutional, as applied to these companies, under the " commerce " clause, and also the " due process " and " equal protection " clauses.

If these corporations show themselves to be in the same situation as was shown with reference to the Kansas tax, the decision must follow the *Western Union* and *Pullman* decisions (216 U. S. 1, 56).

Otherwise, the matter would be governed by the *Baltic* decision (231 U. S. 68), holding the Massachusetts statute

to be constitutional, as applied to the special facts appearing with reference to the companies there involved.

The material facts are totally different from the *Baltic* case.

The Massachusetts and Kansas statutes are precisely alike in all material respects.

In the *White Company* case, it is claimed that the Massachusetts excise is unconstitutional, under the "equal protection" clause, the case being directly within the authority of *Southern Railway Co.* v. *Greene* (216 U. S. 400).

Since the *Baltic* decision, the Massachusetts statute here involved (St. 1909, Chap. 490, Part III, Sec. 56) has been decidedly changed by the amendment contained in St. 1914, Chap. 724, cases under which are now before the Massachusetts Court and will shortly come before this Court.

Believing that both statutes should be considered at the same time, we moved that these cases should be postponed until the Massachusetts Court decides the cases under the new statute.

Our motion having been denied, we shall take the liberty to refer to the new statute, although not involved here.

If a majority of the Court should be of opinion that the original statute is constitutional, we respectfully ask that a re-argument of these cases be ordered, to be heard with the cases involving the present amended statute at the fall term.

Terms of Original Massachusetts Excise Statute.

The original statute is as follows:

"Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the Commonwealth, an excise tax to be assessed by the tax commissioner of one fiftieth of one per cent of the par value of its authorized capital stock, as stated in its annual cer-

tificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars." (Massachusetts Acts 1909, Chap. 490, Part III, Sec. 56).

Terms of Kansas Statute.

The Kansas statute provided that each foreign corporation should pay a charter fee of "one tenth of one per cent of its authorized capital upon the first one hundred thousand dollars of its capital stock, or any part thereof," and for each million above five hundred thousand dollars, the excise amounted to one fiftieth of one per cent, the exact amount specified as the *annual* tax in the Massachusetts statute (216 U. S. 56, 59).

Terms of 1914 Amendment to Massachusetts Statute.

"Every foreign corporation subject to the tax imposed by section fifty-six of Part III of Chapter four hundred and ninety of the Acts of the year nineteen hundred and nine shall in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general for the use of the Commonwealth, in addition to the tax imposed by said section fifty-six, an excise tax to be assessed by the tax commissioner of one one-hundredth of one per cent of the par value of its authorized capital stock in excess of ten million dollars as stated in its annual certificate of condition." (Acts 1914, Chap. 724.)

By Judicial Construction, Massachusetts Excise has been Limited in Scope.

Under rulings of Massachusetts Court, this excise still extends to trading companies engaged in interstate commerce and also carrying on local business, unless both classes of commerce are "inextricably interwoven."

As thus construed, it is unconstitutional, being directly within the authority of the *Western Union* cases (216 U. S. 1, 56).

The Massachusetts statute, upon its face, applies to "*every* such foreign corporation which has a *usual place of business* in this commonwealth" (St. 1903, Chap. 437, Sec. 58; St. 1909, Chap. 490, Part III, Sec. 39).

By judicial construction, the meaning has been narrowed, so that it no longer applies to foreign corporations exclusively engaged in interstate commerce, nor to *quasi*-public corporations carrying on business "for hire" and engaged partly in interstate and partly in domestic business, where it appears that the intrastate business is "so closely connected with the interstate commerce that it could not be given up without serious detriment to the interstate commerce" (S. S. White Case, 212 Mass. pp. 35, 43).

The statute, accordingly, still applied (after the S. S. White decision) to all other classes of interstate commerce corporations which are also engaged in transacting domestic business in Massachusetts, at the same *places* and through the *same instrumentalities*. A further modification has been introduced by the *Marconi* decision [the decision here appealed from].

> *Marconi Wireless Tel. Co. et al.* v. *Commonwealth*, 218 Mass. 558.

It is now admitted by the Court below that the protection of the "commerce" clause extends to *all kinds* of interstate commerce, including sales of goods.

The statute now applies to all mercantile, trading, manufacturing, and mining companies there transacting interstate commerce, consisting of sales of goods in one State for delivery in another State, and also carrying on, in conjunction therewith, a purely domestic business at the same places and by means of the same agencies and instrumentalities, *unless* it can be shown that the interstate commerce is "inextricably interwoven" with the domestic business.

In the *Marconi* case (*supra*) the statute was held consti-

tutional by the Massachusetts Court, as applied to these companies now before the Court and the special facts here appearing.

This excise is measured by a percentage upon the total authorized capital stock, which was expressly held to represent the entire business, both interstate and domestic, of a corporation and its entire assets everywhere, by the *Western Union decision*, and, consequently, the excise was held unconstitutional (216 U. S. 1, 56). The Kansas and Massachusetts statutes are exactly alike, in all material respects.

Statutory Requirements as to Foreign Corporations.

A foreign corporation, before commencing business in Massachusetts, must appoint the Commissioner of Corporations as its attorney for service of process (St. 1903, Chap. 437, §58).

Every such corporation must also file with the Commissioner copies of its charter and by-laws and a certificate setting forth various details (§60).

Facts bringing White Company under Doctrine of Southern Railway Co. *v.* Greene (216 U. S. 400).

The White Company was duly admitted to do business in Massachusetts prior to 1903.

It acquired, after 1903 and prior to the change in the tax appearing in the Act of 1909, land at 341 Newbury street, and built thereon a seven-story building made of brick, concrete and steel, with wide floors, no posts and very heavy steel construction, and specially adapted for use as a garage. This building had two corner elevators, and below the first floor were installed three 500-gallon gasoline tanks and on the first floor was a turn-table. The investment therein approximated $175,000 (Rec. 19).

It further acquired for $100,000, prior to the change in

the tax, a building and about 7,000 square feet of land at 320 Newbury street, which was then used as a boarding stable and was altered and remodeled by the company, at an expense of $22,000, for a service station. The partitions were removed, the floors were strengthened by heavy steel concrete construction, the building was made fireproof, and gasoline tanks and elevators were placed in the building, in order to make it peculiarly adapted for the use of automobiles. The petitioner has not used or occupied this piece of property for several years past, and has had the property for sale or lease, but has not yet sold or leased it. The petitioner, at the date of payment of the tax, owned both of these pieces of property (Rec. 19).

Tax was Doubled against White Company, and the Privilege of Deducting Local Property Taxes was Repealed after the Company made a Large and "Permanent" Investment in Massachuestts, under the Preceding Tax System. — No Similar Changes were made in Taxes on Domestic Corporations Engaged in Same Line of BUSINESS.

When the *White* Company entered Massachusetts, and made the foregoing investments, under the preceding tax system of 1903, the foreign corporation excise was much less onerous, being one half of the present amount and assessed under Section 75 of Chapter 437 of the Acts of 1903, which provided that every foreign corporation should annually pay "an excise tax to be assessed by the tax commissioner of one hundredth of one per cent of the par value of its authorized capital stock, as stated in its annual certificate of condition; but it may deduct from such tax the amount of taxes upon property paid by it to any city or town in the Commonwealth during the preceding year, and the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars." After the above "permanent" investments were made, the tax was doubled, and the clause

allowing the deduction of local property taxes was repealed. (St. 1907, Chap. 578; now St. 1909, Chap. 490, Part III, Sec. 56.)

Domestic and foreign corporations are both taxable locally, by cities and towns, domestic corporations upon their Massachusetts real estate and machinery (St. 1909, Chap. 490, Part I, Secs. 2, 3 and Sec. 23, clauses 1, 2), and foreign corporations upon their real estate, machinery and merchandise (*ibid.*).

Change in Excise in 1907 Repealed Right of Foreign Corporations to Deduct Local Property Taxes.— Domestic Corporations Still Retain that Right.

From 1903 to 1907 both domestic and foreign corporations might deduct local property taxes (St. 1903, Chap. 437, Secs. 72, 75). This privilege was taken away from foreign corporations in 1907 (St. 1907, Chap. 578), but was retained for all domestic corporations engaged in the same line of business and having the same kind of property as the *White* Company, and they are still entitled to deduct from the market value of their shares, the basis of their excise tax, the value of real estate, machinery, non-taxable securities, and " the value of its property situated in another State or country and subject to taxation therein " (St. 1909, Chap. 490, Part III, Sec. 41, clause 3; see also Sec. 43).

These suits are for the recovery of an unlawful tax, assessed under a statute alleged to be unconstitutional. The form of remedy is specifically authorized (*ib.* Sec. 70).

General Characteristics of Interstate Business of These Foreign Corporations.

The present companies are trading companies, some also doing their own manufacturing, but all selling goods for delivery into States other than where they are manufactured, mined or produced, and " to that extent, they are engaged

in the business of carrying on interstate commerce and are entitled to the protection " of the " commerce " clause (*Baltic* case, 231 U. S. 68, 86), excepting *Copper Range* Company, which is a mere holding company, and the *White* Company, where the " commerce " clause is not involved.

Their main or dominant business in Massachusetts is of an interstate character.

These companies, with the exceptions stated, are conducting interstate commerce in Massachusetts in conjunction with domestic *business* or local *functions*, by means of the *same agencies* and *instrumentalities* and at the *same places*, and, in this respect, they differ wholly from the *Baltic* case (231 U. S. 68).

These cases arise under requests for rulings filed by each party. All of the petitioners' requests were refused (Rec. 4 — See Assignments of Errors, Rec. 49–54).

General Characteristics of Local Activities and Functions of the Several Companies.

In some instances, like the *Cheney* and *Champion* cases, the *business* transacted in this State is *exclusively* interstate commerce. All local activities and functions, aside from the real *business*, consist of mere " incidents " to interstate commerce, and if not so to be regarded, they, in any event, do not constitute *business* or the transaction of *business*. The place where conducted is not an " usual place of business," as required by the excise statute.

The place of business is maintained here *exclusively* for interstate commerce and its fair " incidents."

In the *Lanston*, *Locomobile* and *Northwestern* cases, the companies transact a very small percentage (1% in the *Northwestern* case) of local business, in conjunction with their interstate commerce, their places of business in this State being maintained for the purposes of both kinds of commerce, without distinction, discrimination or separa-

tion, and both classes of commerce being conducted at the *same places* and by means of the *same instrumentalities.*

This small amount of local business is claimed to be of such trifling character as not to be " real and substantial " within the meaning of the *Baltic* opinion (216 U. S. 58, 86) or so relatively slight that the amount or value of the local privilege or business and the size of the large tax cannot be regarded as bearing any fair and reasonable relation to each other.

In these cases, the local business is claimed to be a mere " incident " to interstate commerce, or, in any event, to be so connected with it that the former could not be abandoned without injuring and burdening the interstate commerce.

Copper Range Case as to Holding Companies.

The *Copper Range* case presents the question as to a mere holding company, transacting no commerce and owning no property in this State.

It holds shares in foreign corporations and lands located without the limits of the State.

White Case Involves Southern Railway Doctrine (216 U. S. 400).

The *White* case presents the case of a foreign corporation which acquired a " permanent " and valuable investment, of a peculiar nature, in the State, prior to the onerous changes in the excise made in 1907, and on the faith of the preceding tax system of 1903. It comes directly within the principles of *Southern R'y Co.* v. *Greene* (216 U. S. 400), as we claim.

SPECIFICATION OF ERRORS RELIED ON.

The plaintiffs in error specify the following errors of the Court below now relied on:

1. In upholding the constitutionality of the Massachusetts foreign corporation excise (Sec. 56, Part III, Chap. 490, Mass. Acts of 1909), as applied to these petitioners, under the "commerce" clause of the Federal Constitution (1st Ass't. Errors — Rec. 50).

2. In upholding the constitutionality of said excise under the "due process" clause (2d Ass't. Errors — Rec. 50).

3. In upholding the constitutionality of said excise, as applied to the White Company, under the "equal protection" clause, and within the authority of *Southern R'y Co.* v. *Greene*, 216 U. S. 400 (8th Ass't. Errors — Rec. 51).

4. In refusing to rule that said excise is unconstitutional, under the "commerce" clause, as applied to all the petitioners, except the White Company, under the direct authority of the *Western Union* and *Pullman* decisions (216 U. S. 1, 56), which are controlling here (3d Ass't. Errors — Rec. 50).

5. In refusing to rule that, as applied to these petitioners, "it must appear that the amount of local business and the value of the privilege bear some fair and reasonable relation to the amount of the tax imposed for the privilege" (4th Ass't. Errors — Rec. 50). Otherwise, the tax is unconstitutional.

6. In refusing to rule that the tax is unconstitutional, if, as applied to these petitioners, it is "*unduly great*, having reference to the real value of the local business and the property used therein," or is "so *disproportioned* to the volume and profits of the local business, and to the value of the privilege taxed, that it should be regarded as a mere

device to reach " the interstate portion of the company's commerce, property and profits (5th Ass't. Errors — Rec. 50).

7. In refusing to rule that the " reality and substantiality " of the local business " must be determined by taking into account, among other factors, the percentage of the company's local business, as compared with its interstate commerce transacted " in Massachusetts (7th Ass't. Errors — Rec. 51).

8. In refusing to rule that, if the local *business* or *functions* are " mere incidents " to its interstate commerce, they do not justify the imposition of said excise, and in ruling, on the contrary, that they do warrant such an excise, unless they are *necessary* to such commerce and " hence inseparable from " it (9th Ass't. Errors — Rec. 51).

9. In refusing to rule that the miscellaneous *functions* and *activities* of the several petitioners, carried on in Massachusetts, are each and all *fairly* and *reasonably incident* to its interstate commerce there transacted (10th and 12th Ass'ts. Errors — Rec. 52).

10. In refusing to rule that a foreign corporation cannot be taxed for the privilege of maintaining a local office for the direction, superintendence or management of interstate commerce, or for handling and distributing the revenues derived therefrom, whether by a local manager, a Treasurer, a President or a Board of Directors (13th Asst. Errors — Rec. 52).

11. In refusing to rule that directors' meetings do not constitute the transaction of *business*, where the real *business* is wholly interstate commerce (14th Ass't. Errors — Rec. 53).

12. In refusing to rule that mere ownership of shares in foreign corporations engaged in interstate commerce, and the receipt and distribution of dividends therefrom, do not constitute the transaction of " business " (15th Ass't. Errors — Rec. 53).

13. In erroneously holding that it is a material factor, whether or not the company is " free to renounce " its local business, or that such business is " reasonably susceptible of separation from its domestic commerce," whereas such considerations have no important bearing upon the constitutionality of such an excise (18th Ass't. Errors — Rec. 53).

14. In refusing to rule that the statute is unconstitutional under the " equal protection " clause, because it is palpably arbitrary classification, resting upon no reasonable basis for distinction, in that it arbitrarily fixes $10,000,000 capital as the line, and exempts the larger and richer corporations from any taxation on their excess capital above that amount (8th Ass't. Errors — Rec. 51).

15. In dismissing the several petitions, when decrees should have been entered for the petitioners, for the various reasons argued in this brief (20th Ass't. Errors — Rec. 54).

BRIEF OF ARGUMENT.

Summary of Main Contentions of Plaintiffs in Error.

1. In each of these cases (except the *White* and *Copper Range* cases) the petitioner claims that the Massachusetts excise, as applied to it, is unconstitutional, because it conflicts with the " commerce " clause.

2. In each case (except the *White* and *Copper Range* cases) this excise, because of its being measured by the entire capital stock, necessarily has the effect of *burdening* the interstate portion of the business, as was decided to be the " necessary operation " of the Kansas statute, in precisely the same terms, by the *Western Union* cases (216 U. S. 1, 56).

The statutes being the same, in terms, their " necessary operation " *must* be the same.

These cases come directly within the authority of the *Western Union* cases.

The statute is unconstitutional, because it is in conflict with the " commerce " clause, as applied to these companies, carrying on both classes of commerce, in conjunction, at the *same places* and by means of the *same instrumentalities*, thus differing from the *Baltic* Company (231 U. S. 68).

3. This statute, by its necessary operation, taxes property outside of Massachusetts, which is *necessarily represented* by the entire capital stock, and is, accordingly, unconstitutional, because it is in conflict with the " due process of law " clause, as was expressly decided, as to the Kansas excise, in precisely the same form, by the *Western Union* cases (216 U. S. 1, 56).

This is especially true as to *Copper Range* Company, the capital stock of which " represents " partly mineral lands owned by the company in Michigan (Rec. 18).

The " necessary effect " is that, to this extent, the company is taxed solely because of its ownership of foreign real estate. This is precisely the same as if Massachusetts attempted to tax the individual owners of foreign real estate, because of their management of it by correspondence, etc., carried on through a Massachusetts office.

4. In the case of the White Company this excise is unconstitutional, because it conflicts with the " equal protection of the laws " clause, under the principles of *Southern R'y.* v. *Greene* (216 U. S. 400), the company having acquired here a large and " permanent " investment, under the preceding tax system, and prior to the passage of this excise statute, which doubled the previous tax, and repealed the privilege theretofore enjoyed of deducting local property taxes, when at the same time no similar additional burdens were imposed upon domestic corporations engaged in the same line of business.

5. As applied to all these companies, this statute denies " equal protection of the laws," because it arbitrarily, and without any reasonable basis for distinction, draws the line at $10,000,000 capital, thereby discriminating against the smaller and poorer corporations, by taxing them on their whole capital, and by completely exempting the larger and richer companies from any taxation on the excess above that line (under the original statute), or by taxing the latter upon such excess at one-half the rate (under the amended statute).

Such favoritism shown to the rich, merely because of their size or wealth, is not reasonable classification, but is palpably arbitrary.

6. The various local activities and functions relied on by the Court below, as a proper basis for this excise, are all matters *fairly incident* to interstate commerce.

If the commerce itself is protected by the Constitution, all its *reasonably fair incidents* must equally be protected.

7. These functions are also *means* and *instrumentalities* of interstate commerce, and, consequently, are protected from State taxation.

8. If these activities and functions are not mere "incidents," they do not constitute the transaction of "business," properly so called.

The place where these functions are conducted is not an "usual place of business," as required by the Massachusetts excise.

I.

MEANING AND EFFECT OF WESTERN UNION AND PULLMAN CASES (216 U. S. 1, 56). — THESE DECISIONS CONTROL HERE, SINCE THE MASSACHUSETTS EXCISE IS, IN TERMS, PRECISELY LIKE THE KANSAS EXCISE THERE CONDEMNED, SO FAR AS THESE COMPANIES ARE CONCERNED. — IT IS NOT MATERIAL THAT OTHER AND LARGER COMPANIES CAME UNDER A MAXIMUM PROVISION OF $2,000.

This excise is measured by the entire authorized capital stock of the corporation, which represents its property and assets everywhere and its entire commerce, both interstate and domestic, as was directly decided in the *Western Union* cases (216 U. S. 1, 56).

Such a measure, in its *necessary operation* and effect, *directly burdens* the interstate portion of the company's commerce, and is, consequently, an unconstitutional measure.

This was the *necessary operation* and effect of the Kansas excise, as was directly decided.

> *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1.
> *Pullman Co.* v. *Kansas*, 216 U. S. 56.

No possible distinction can be suggested between the Kansas statute and the Massachusetts excise, as imposed by the original Statute of 1909, except that this statute limited the tax to a maximum of $2,000. This limit has now been repealed. (St. 1914, Chap. 724.)

This Court in the *Baltic* decision expressly stated that

it had "no disposition to limit the authority of those [Kansas] cases."

Baltic Mining Co. v. *Massachusetts*, 231 U. S. 68, 85.

The *Baltic* opinion contained no suggestion that the terms of the Massachusetts statute differed in any respect whatsoever from the Kansas statute. The fact that a maximum of $2,000 appeared in the Massachusetts statute was casually mentioned. No reasoning was based on that fact. It is obviously immaterial, so far as these companies are concerned, that some larger company comes within the application of the $2,000 maximum. As applied to these companies, the tax fluctuates with the volume of interstate capital and business.

The similar Arkansas statute has also been condemned.

Ludwig v. *Western Union Telegraph Co.*, 216 U. S. 146.

Western Union Telegraph Co. v. *Andrews*, 216 U. S. 165.

So also as to the Colorado excise based on the same unlawful measure.

Atchison &c R'y Co. v. *O'Connor*, 223 U. S. 280.

The meaning and application of the *Western Union* decision, as stated by Mr. Justice Day in the *Baltic* opinion (231 U. S. 68, 85), do not differ materially from previous statements made by the same justice.

Southern Railway Co. v. *Greene*, 216 U. S. 400, 416.
Flint v. *Stone Tracy Co.*, 220 U. S. 107.

As no possible material difference between the statute of Massachusetts and those condemned has been or can be pointed out, as applied to companies not concerned with or affected by the maximum provision, it follows that the

Baltic decision must rest solely on the special facts there appearing with reference to the *Baltic Mining Co.*, and the *S. S. White Dental Mfg. Co.*

It goes without saying that the Massachusetts statute would be held unconstitutional, equally with the Kansas, Arkansas and Colorado statutes, because it is in precisely the same terms, if the question were raised by a telegraph, palace car or railroad company.

It may properly be stated, as an illustration of the practical working of such a tax system, that since the amended statute was enacted, it has been claimed that the Pullman company was liable for a tax of $13,000, in spite of the *Kansas* decisions, but it is now understood that such a claim has been abandoned.

Upon what grounds can the Pullman Company be favored, under a law precisely like the Kansas statute? Surely not upon the ground that a palace car company cannot as readily as any other foreign corporation "renounce" or abandon its local Massachusetts traffic.

As suggested by Mr. Justice Holmes (216 U. S. 56, 75), all that it has to do is to roll its cars out of the State which were previously used for domestic traffic. Or it may merely stop selling tickets for intrastate business.

This could surely be accomplished more readily and with smaller loss by the Pullman Company than the local business could be abandoned by a manufacturing plant like the *Locomobile* Company's, possessing special appliances and machinery used in its repair shops.

Nor could it fairly be claimed that the domestic business of the Pullman Company is any more "inextricably intertwined" with its interstate commerce than is the case with a manufacturing or trading company making and selling goods for purposes both of interstate and domestic commerce, the same being sold at the *same places* and by the *same instrumentalities.*

It does not require argument to show that the interstate

and domestic businesses of the Pullman Company are more easily separable than in the case of the companies now before this Court.

If suit should be brought by the Pullman Company, even under the original statute, the tax would clearly be held unconstitutional under the decision in *Pullman Co.* v. *Kansas* (216 U. S. 56):

(1) Because the Massachusetts and Kansas statutes are precisely alike;

(2) Because the companies attacking these statutes are identical.

The *Baltic* decision could not conclude the Pullman Company, because that case did not, in the opinion of the Court, present facts similar to what appeared in the *Western Union* and *Pullman* cases.

II.

Meaning and Effect of Baltic Decision (231 U. S. 68).

The doubts expressed by Courts and the bar as to precisely what facts appeared in the *Baltic* case, which differentiated it from the *Western Union* cases, warrant and require our examination of the matter in some detail.

See

Crane Co. v. *Looney*, 218 Fed. 260.

The Massachusetts statute has been upheld, as applied to the Baltic Mining and S. S. White Dental Manufacturing companies.

Baltic Mining Co. v. *Massachusetts*, 231 U. S. 68.

The Kansas statute, in precisely the same terms, has been held unconstitutional, as applied to the Pullman and Western Union companies.

Western Union Telegraph Co. v. *Kansas*, 216 U. S. 1.
Pullman Co. v. *Kansas*, 216 U. S. 56.

The principles of the *Western Union* decision were expressly approved in the *Baltic* opinion (231 U. S. 68, 85).

Wherein lies the difference between these decisions, the statutes being precisely the same?

The real result of these decisions must be this:

(1) The Massachusetts statute would be held unconstitutional, if attacked by the Pullman Company or any other company presenting the same material facts as appeared in the *Western Union* cases.

(2) The same statute would be regarded as constitutional, if attacked by a company in the same condition as the two companies involved in the *Baltic* decision.

As the Court observed in the *Baltic* decision (231 U. S. 68, 85):

> "Every case involving the validity of a tax must be decided upon its own facts."

See the same statement approved in

> *Kansas City &c Co.* v. *Botkin* (decided Feb. 21, 1916).

Clearly, the *Baltic* case rests upon its own special facts and the decision was carefully limited to the exact facts there appearing.

Do these companies present new facts bringing them within the authority of the *Western Union* decision?

The answer to this inquiry depends on a careful examination of the precise facts which were deemed to differentiate the *Baltic* from the *Western Union* case.

We submit that there were substantial distinctions in the facts relating to the *Baltic* Company which do not appear in the present cases, which, in all material aspects, present the same state of facts as the *Western Union* and *Pullman* cases, the statutes being precisely alike, except as to the maximum provision, which has no application to these companies.

In order to determine the precise differences in essential facts, we shall be obliged to examine the language of the Court somewhat in detail.

FIRST. The Court says (231 U. S. 68, 86):

> " In the cases at bar the business for which the companies are chartered is not of itself commerce."

The companies now before the Court are authorized by their charters to *sell* goods for delivery into a State other than the State where manufactured or mined.

This charter power obviously covers the right to transact interstate commerce by means of interstate sales in Massachusetts and elsewhere.

Apparently, however, this suggestion had little weight with the Court, for it is immediately followed by the direct statement which governs the companies now before the Court:

> " True it is that their products are sold and shipped in interstate commerce, and *to that extent* they are engaged in the business of carrying on interstate commerce and are entitled to the protection of the Federal Constitution against laws burdening commerce of that character.
>
> "*Interstate commerce of all kinds* is within the protection of the Constitution of the United States, and it is not within the authority of a State to tax it by burdensome laws " (231 U. S. 68, 86).

See also

Kansas City &c Co. v. *Botkin* (decided Feb. 21, 1916).

SECOND. The Court further says (p. 86):

> " From the statement of facts it is apparent, however, that each of the corporations in question is carrying on a purely local and domestic business *quite separate* from its interstate transactions " (*ib.*, p. 86). This is the *vital* fact in the *Baltic* decision.

The interstate sales were all made in New York.

Entirely separate business activities were carried on in Massachusetts. The interstate and domestic businesses were not carried on at the *same places* and by the *same instrumentalities.*

In the present cases, the facts are altogether different.

The quoted statement does not refer to the question of *separability* of its domestic from its interstate commerce, but merely refers to the conceded fact that the company's domestic activities were, *in fact, actually separated* from its interstate selling transactions, for the *Baltic* company regularly made its interstate sales in New York through a selling agency there, which had no office whatever in Massachusetts (*ib.*, p. 79).

All local activities of the company in Massachusetts were, in fact, totally separated from its interstate commerce, all of which was conducted in New York or through a New York selling agency.

Where occasional sales were made in Massachusetts for delivery therein, they were all made through the New York selling agency, and all involved interstate commerce, because they were deliverable from the mine or smelter in Michigan. In other words the *Baltic* company transacted no " domestic commerce " of any kind whatsoever.

There was no " permanent " investment in Massachusetts devoted to the transaction of both classes of commerce in conjunction and through the same instrumentalities.

Here, on the contrary, the facts deemed essential in the *Baltic* case are totally different. The two classes of commerce are not, in fact, kept separate and apart, but are carried on at the *same places* in conjunction, and through the *same instrumentalities.* Nor can they easily be separated.

THIRD. The Court further says (*ib.*, p. 85):

" In the Kansas cases the business of both complaining companies was commerce, the *same instrumentalities*

and the *same agencies* carrying on in the *same places* the business of the companies of state and interstate character."

This is the other *vital* point wherein the *Baltic* case failed. Here, the facts are totally different.

Here, the business of the complaining companies is "*commerce*" transacted in Massachusetts, like the ordering and managing of deliveries under interstate sales carried on in Boston by the *Champion Copper* Company. Some of the companies transact nothing but "commerce" in this State, so far as revenue-producing *business* is concerned, and in conjunction therewith exercise local certain activities or functions.

On the other hand, it was quite true that the *Baltic* Company was conducting no "commerce" whatever in Massachusetts, because its sales, in the regular course of business, were made in New York through a selling agency there, and no office was maintained in Massachusetts which had anything whatever to do with sales or commerce.

The *Baltic* Company did not transact in Massachusetts both interstate and domestic business *in conjunction*, using the *same instrumentalities*, the *same agencies* and the *same places*.

The *Baltic* Company did its interstate business exclusively through the *United Metals Selling* agency in New York. Whatever Massachusetts sales appeared were also transacted through this agency, and not through the Massachustts office. Its interstate sales were not conducted by the *same agency* or at the *same place* as its local Boston functions, which were not concerned with sales or "commerce."

It had no selling office in Massachusetts.

Here the various companies transact interstate and domestic business or activities at the *same places* and in conjunction.

The same salesmen negotiate both interstate and domestic sales, in certain of the cases.

The same offices are used.

It, therefore, appears clearly that in these cases the *same instrumentalities* and the *same agencies* carry on in the *same places* domestic business or functions in conjunction with interstate commerce.

FOURTH. The Court (*ib.*, p. 86) further observed that, in the *Western Union* cases, " there was no attempt to separate the intrastate business from the interstate business by the limitations of state lines in its prosecution."

In these cases no such " attempt " appears, for both classes of commerce were transacted at the same places and by the same instrumentalities, without any separation or distinction, in fact.

FIFTH. It should be noted that, in the *Baltic* decision, the Court makes no reference whatever to the *inseparability* of the two classes of commerce.

In order to come within the authority of the *Western Union* cases, must these classes be absolutely incapable of separation?

The *Baltic* case does not state this as a requirement.

It merely states that there was, *in fact*, a separation.

No such requirement was suggested in the *Western Union* decision nor in any previous case in this Court.

Physical inseparability can never exist.

" Inextricable Intertwining " of Both Classes of Commerce is Not a Material Factor. — The Doctrine is an Invention of the Massachusetts Court, and has No Support in the Decisions.

The doctrine of " inextricable intertwining " of the two classes of commerce is wholly due to the invention of the Massachusetts Court, for it had never been suggested anywhere, prior to the decision of that Court (*Baltic Mining Co.* v. *Commonwealth*, 207 Mass. 381, 390), that it must appear that the company is engaged in intrastate business " so

closely connected with the interstate commerce that it could not be given up without *serious detriment* to the interstate commerce."

That Court later stated that the *Western Union* principle is not applicable, unless it is made to appear that there is an "*inextricable connection*" between the interstate and intrastate business or that they are " so *interwoven* that they *cannot* be *separated reasonably*."

They must be shown to be "*inextricably interwoven*" (*S. S. White Dental Mfg. Co.* v. *Commonwealth*, 212 Mass. 35, 44, 45).

The latest form in which this theory is stated is that a company must show that its domestic business is not "*reasonably susceptible* of *separation* from its interstate commerce" (*Marconi Wireless Tel. Co.* v. *Commonwealth*, 218 Mass. 558, 566).

One would have to search far for these expressions in the *Western Union* or *Baltic* decisions, or for anything remotely suggesting any such limitation of the principles laid down in the *Western Union* cases.

No similar doctrine can be found elsewhere in the decisions of this Court.

In the *Western Union* cases the matter was expressly treated merely as a *commingling* of the two classes of commerce transacted through the same *instrumentalities*.

As stated by Mr. Justice Harlan, the Kansas statute compelled the company to pay the excise " in order that it might do local business in Kansas in *connection with* its interstate business " (216 U. S. 56, 63).

Or, as stated by Mr. Justice White, the excise was imposed " as the price for the privilege of doing local in *conjunction* with the interstate commerce business " (216 U. S. 56, 68).

There is nothing in these statements to suggest that the two classes of commerce must be " inextricably interwoven."

The *Baltic* decision was rendered, because the interstate

commerce was not transacted in *conjunction* with local business, for it was conducted in New York wholly separate and apart from the Massachusetts local activities and through a separate agency.

Far from justifying the doctrine of the Massachusetts Court, the *Pullman* case shows that, in case of a sleeping car company, there is obviously no *permanent* local investment in the State, that the local business can readily be abandoned without loss of anything except the extra profits derivable from intrastate commerce, that there is no "inextricable interweaving" of the two classes of commerce, and that they are readily separable either by refusing to sell tickets for local traffic or by removing the rolling stock from the State.

Or, as put by Mr. Justice Holmes in his dissenting opinion, whatever may be true as to a telegraph company, the investment of the Pullman Company in Kansas consisted merely of the temporary "presence in the State of cars that can be and are rolled out of it at will."

Pullman Co. v. *Kansas*, 216 U. S. 56, 75.

If the Pullman Company had "renounced" its right to transact local business, it would have suffered no loss whatever of permanent investment or plant in that State, for it had none. Its losses, in every way, would not have been comparable with those of a manufacturing plant, which would obviously suffer the loss of a considerable part of the value of its plant, if it should abandon or remove its plant or should "renounce" the right to use it for purposes of domestic commerce.

Instead of *inseparability* being a reason for or test of the unconstitutionality of a tax, as the Massachusetts Court holds, the reverse is true according to the decisions of this Court, for an indiscriminate tax on interstate and domestic receipts of a telegraph company, without attempt at ap-

portionment, is unconstitutional, largely *because* they are *separable*.

Ratterman v. *Western Union Tel. Co.*, 127 U. S. 411.
Leloup v. *Port of Mobile*, 127 U. S. 640.
Crutcher v. *Kentucky*, 141 U. S. 47.

The difference between the tests imposed by the Massachusetts theory and those stated by this Court becomes still more apparent from examination of the exact language used in the *Baltic* opinion, where there is no reference whatsoever to " inextricable interweaving " of the two classes of commerce or to their " inseparability." There is no suggestion that there must be *so close* a *connection* of these classes that the intrastate business cannot be abandoned " without serious impairment " of the interstate commerce.

This Court simply states the fact that each of the corporations there involved was carrying on a local business "*quite separate* from its interstate transactions."

Baltic Mining Co. v. *Massachusetts*, 231 U. S. 68, 86.

It adds merely that the local business is " real and substantial " and " not *so connected with* interstate commerce as to render a tax upon it a *burden* upon the interstate business of the companies involved " (*ib.*, p. 86).

The only test required by this language is that the interstate and domestic businesses must be carried on in conjunction by the same agencies and that it must be made to appear that the particular excise *burdens* the interstate portion of the business, but does not so operate merely in a remote or incidental way.

If this is the *necessary operation* and effect of such an excise, as was directly decided in the *Western Union* cases, it matters not whether the domestic and interstate portions of the business are *inextricably interwoven* or, on the other hand, whether these classes are merely commingled or transacted in conjunction with each other.

The sole question of importance in any case is whether a substantial *burden* is imposed on the interstate portion of the business by the "necessary operation and effect" of such an excise, the other considerations being wholly inconsequential, except as they may throw light upon the *necessary effect* and operation of the excise.

SIXTH. The *Baltic* opinion makes no reference to the consideration so much relied on by the Massachusetts Court, to the effect that the company is "free to renounce" or abandon the local privilege, if it does not wish to pay the tax therefor.

If this were an important consideration, it is plain that the effect of abandonment of the local business would be serious in some of the cases affected by this excise.

Clearly, the results of abandonment of a manufacturing plant would be fully as serious as with a railroad or palace car company.

The difficulties in the way of such abandonment are much greater.

All that a railroad company has to do is to refuse to sell tickets for local traffic.

A palace car company can roll its cars outside of the State and use them elsewhere.

SEVENTH. The next distinguishing fact mentioned in the *Baltic* opinion is stated thus (*ib.*, 86):

> "In the *Western Union Telegraph Company Case*, the company had a large amount of property *permanently* located within the State, and between 800 and 900 offices constantly carrying on both state and interstate business.
>
> "The Pullman Company has been running a large number of cars within the State, in state and interstate business, for many years."

It is true that the Baltic Company and the S. S. White Company had no property permanently located within the State, except a small amount of office furniture and fixtures.

But in some of the present cases large amounts of permanent investments in plant, like repair shops, appear to have been made and used for both classes of commerce in conjunction.

Mere size of the investment obviously cuts no figure in the decision.

But if it did, the actual figures in the *Western Union* case showed no great investment.

All that there appeared was the allegation that the Western Union Company had expended, prior to the Act in question, "*many thousands of dollars* in the construction of lines and wires and in the other appurtenances of the telegraphic business and in the establishment of offices" (216 U. S. 1, 10).

The Pullman Company had absolutely no *permanent* local investment, and nothing but movable rolling stock.

EIGHTH. In the *Baltic* opinion certain other facts were stated as if they possessed some significance. None of these facts appear even by inference in any of these cases.

> "In the *Baltic Mining Company Case*, the authorized capital is $2,500,000, while the entire property and assets are $10,776,000; and in the *White Dental Company Case* the authorized capital is $1,000,000, while the assets aggregate $5,711,718.29" (*ib.* 87.)

The present record shows no surplus assets in any case. In some of the cases, if it were material, it would be easy to show that there was, in fact, no surplus. No inferences can be drawn, where a case is tried upon agreed facts in the Massachusetts Court, unless it is agreed that the Appellate Court may draw inferences.

Boston v. *Brooks*, 187 Mass. 286.

NINTH. The *Baltic* opinion also observes (231 U. S. 68, 87):

" Further, the Massachusetts statute limits the tax to a maximum of $2,000."

This is absolutely the only statement made as to this matter. No apparent importance was attached to this fact by the Court. But this is no longer the case since the passage of Chapter 724 of the Acts of 1914, abolishing the maximum limit.

TENTH. As to the claim there raised that the *Greene* decision (*Southern R'y Co.* v. *Greene*, 216 U. S. 400) was applicable, the *Baltic* opinion says (231 U. S. 68, 88):

" The *conditions* existing in the *Southern Railway Co.* v. *Greene Case* are *not presented here*. It is true that the plaintiffs in error paid taxes assessed against foreign corporations before the passage of the law of 1909 and that the *White Dental Company* had a leasehold for storerooms in the State, but we do not find in this situation an *acquisition of permanent property*, such as was shown in the *Greene Case*."

The "acquisition of *permanent* property " is fully shown here, in the *White Company* case.

Moreover, the property is " valuable," and of a peculiar nature, not easily convertible to ordinary real estate uses, except at considerable loss.

Unless the doctrine of the *Greene* case is to be confined to railroads and the like, as the Massachusetts Court seems to think (Rec. 45), the *Greene* case directly applies to the *White Company*, which clearly had a *permanent* and *valuable* investment in Massachusetts acquired on the faith of the preceding tax system, prior to the Act of 1909, and which could not readily be devoted to other uses, abandoned or removed, except at a very substantial loss.

ELEVENTH. In the *Baltic* case, where the material facts were totally different from those shown here, the Court stated (231 U. S. 68, 85):

" Every case involving the validity of a tax must be

decided upon its own facts, and having no disposition to limit the authority of those [*Western Union*] cases, the facts upon which they were decided must not be lost sight of in deciding other and alleged similar cases."

But even on the specially unfavorable facts shown in the *Baltic* case, the Chief Justice, Mr. Justice Van Devanter and Mr. Justice Pitney dissented, holding the Massachusetts tax to be unconstitutional, even as applied to the facts in the *Baltic* case.

III.

Main Reasons Given by the Massachusetts Court for Distinguishing the Massachusetts from the Kansas Excise, have now been Completely Done Away With.

It should be pointed out how far the essential reasons given by the Massachusetts Court for upholding the constitutionality of this excise have now been completely done away with, since the original decision in the *Baltic* case (207 Mass. 381).

The Massachusetts Court, following its previous decision in the *Baltic* case, stated, in substance, that the principles of the *Western Union* decision do not apply to the Massachusetts tax for two reasons:

(1) Because that decision covers only *quasi*-public corporations;

(2) Because the Massachusetts statute has a maximum tax of $2,000.

Or, in the language of that Court:

"There are at least two important, and as we think vital, distinctions between these cases and the one at bar.

"The first is that these cases all relate to corporations directly engaged *for hire* in transportation of intelligence or commerce or persons between the States; and their capital invested in this business was of such a *permanent*

and fixed nature that the local business could not be given up without impairing their capacity to transact efficiently their interstate business. *Their main business was interstate commerce of a quasi-public character.* . . .

" The second distinction between our statute and those under consideration in the Federal cases last cited, is that the maximum fee allowed by our statute is $2,000."

S. S. White Dental Mfg. Co. v. *Commonwealth*, 212 Mass. 35, 42.

The first of these " vital distinctions " must now be regarded as finally abandoned by the Massachusetts Court, inasmuch as the Court now definitely holds that the protection of the " commerce " clause extends to trading corporations, and is not confined to *quasi*-public corporations. If the " commerce " clause is not limited to *quasi*-public corporations, no reason can be presented why the principles of the *Western Union* decision should be confined to transportation companies engaged in business " for hire," as was stated in its opinion in the *S. S. White* case (*supra*) and in the *Baltic* case (207 Mass. 381).

The present views of the Court below are thus stated:

" The contention of the Commonwealth that these sentences [in previous opinions of that Court] were not intended to apply to and do not apply to corporations doing a commercial or trading business, but only to transportation corporations, cannot be supported " (p. 564). . . . It is apparent from this review of decisions that the interstate commerce regulation which is under the exclusive control of Congress and which cannot be affected by any discriminatory State law, includes not merely transportation, but the other inherently necessary incidents of *purchase* and *sale* of *goods*."

Marconi Wireless Tel. Co. v. *Commonwealth*, 218 Mass. 558, 564, 565, 566.

This being the case, it is a necessary inference that the principles of the *Western Union* decision were not intended

to be confined to transportation companies " for hire," or to *quasi*-public corporations, but, as appears upon its face, as well as in the *Baltic* opinion (231 U. S. 68, 86), extend broadly to all classes of interstate commerce corporations, including trading companies.

The incidental fact stated by that Court, that the *Western Union* cases involved *permanent* investments of a peculiar nature, which could not readily be abandoned or moved, is also sufficiently disposed of by the fact that the *Pullman* Company obviously had no *permanent* investments whatsoever in Kansas, for its cars were readily movable into and out of that State.

The second of the vital distinctions stated by the Massachusetts Court consists in the fact that the Massachusetts excise differed from the Kansas Statute, in that the former was limited to a maximum tax of $2,000, to which, by the way, none of the companies then or now before the Court are subjected.

This fact was not in any way referred to by this Court in the *Baltic* opinion as a material circumstance, and was not the ground for the decision, as will be shown below.

But this maximum limit has now been completely removed by Chapter 724 of the Acts of 1914.

As the matter now stands, the two vital distinctions stated by the Massachusetts Court, by reason of which it held that the Massachusetts excise is not controlled by the *Western Union* decision, are both completely out of the way.

Unless some better reason can be suggested, the present cases are controlled by that decision.

IV.

Settled or Unquestionable Doctrines as to the "Commerce" Clause.

The doctrines as to the effect of the "commerce" clause which may be regarded as fairly settled or unquestionable and to require no extended argument, may be summarized as follows:

Trading Companies Selling Goods in Interstate Channels are Protected by the "Commerce" Clause.

1. Ordinary trading corporations engaged in the business of selling goods for delivery in States other than the State where manufactured, or where the sale requires or contemplates the transportation of the goods sold from one State into another, are engaged in interstate commerce.

This proposition is now settled, contrary to the long continued and vigorous contentions of the Commonwealth.

As was held in the *Baltic* decision:

> "True it is that their products are sold and shipped in interstate commerce, and to *that extent* they are engaged in the business of carrying on interstate commerce and are entitled to the protection of the Federal Constitution against laws burdening commerce of that character.
>
> "*Interstate commerce of all kinds* is within the protection of the Constitution of the United States, and it is not within the authority of a State to tax it by burdensome laws."

Baltic Mining Co. v. *Commonwealth*, 231 U. S. 68, 86.

Kansas City &c R'y Co. v. *Botkin* (decided Feb. 21, 1916).

Principles of the Western Union Decision Cannot be Confined to Quasi-Public Corporations.

2. The principles of the *Western Union* cases (216 U. S. 1, 56) cannot be confined to telegraph, sleeping car, railroad and other *quasi*-public corporations, nor to corporations conducting some kind of interstate commerce "for hire," as was formerly held by the Massachusetts Court in *Baltic Mining Co.* v. *Commonwealth* (207 Mass. 381, 390) and *S. S. White Dental Mfg. Co.* v. *Commonwealth* (212 Mass. 35, 42). They apply equally to "interstate commerce of all kinds," including that transacted by trading and manufacturing companies like these petitioners, as was expressly stated by this Court in the *Baltic decision* (231 U. S. 68, 86).

We may now fairly conclude that the Massachusetts Court can no longer consistently hold to its former view that the effect of the *Western Union* decision is confined to transportation companies, because that Court now distinctly holds that the "commerce" clause protects interstate commerce of *all kinds*, including that conducted by trading companies.

In the *Cheney Brothers* case in the Court below (*Marconi Wireless Telegraph Co. et al.* v. *Commonwealth*, 218 Mass. 558, 564), it expressly stated that "the contention of the Commonwealth that these sentences [in earlier opinions] were not intended to apply to and do not apply to corporations doing a *commercial or trading* business, but only to transportation corporations, cannot be supported."

Equally well, the principles of the *Western Union* decision cannot, upon any reasonable ground, be confined to transportation or *quasi*-public companies.

Terms of Massachusetts and Kansas Statutes are Exactly Alike.

3. The maximum tax having now been abolished by the Massachusetts Legislature (Acts 1914, Chap. 724), abso-

lutely no distinction can be shown to exist between the terms of the Massachusetts and Kansas statutes.

But previous to this amended statute, how can it be possible that these companies, which are not subject to the maximum provision at all, can be affected by the fact that some other companies are subject to a different kind of tax, being subjected to the $2,000 tax? These companies are actually subjected to a tax which does "fluctuate" according to the increases of interstate capital and business.

Two Main Distinctions Relied on by Massachusetts Court are Now Completely Out of the Way.

4. The Massachusetts Court having now definitely abandoned the theory that the protection of the "commerce" clause is confined to transportation companies for "hire," and the $2,000 maximum having now been abolished, the two main distinctions relied on by that Court are completely out of the way, whereby it was sought by that Court to show that the protection of the "commerce" clause, as set forth in the *Western Union* decision, does not apply to trading companies, to the extent that they are engaged in selling goods in channels of interstate commerce.

The Massachusetts Theory that It must be Shown that the Interstate and Domestic Businesses are "Inextricably Interwoven," Stands Wholly Without any Authorities in Support of It.

5. The incidental remaining distinction, beyond the two *main* ones above mentioned, which is still relied on by the Massachusetts Court, stands wholly without any *semblance* of authority in this Court in its favor.

That Court still clings to its unsupported theory that, in any case, in order to come within the authority of the *West-*

ern Union decision, it must appear that the interstate and intrastate businesses are "inextricably interwoven," or that they are "so interwoven that they cannot be separated reasonably" (*S. S. White Dental Mfg. Co.* v. *Commonwealth*, 212 Mass. 35, 44; *Baltic Mining Co.* v. *Commonwealth*, 207 Mass. 381, 390).

The elaborate opinions in the *Western Union* case will be searched in vain for the remotest suggestion in support of this theory.

The facts in the *Pullman* case (216 U. S. 56) show incontestably that this consideration could have had no possible weight, for obviously its domestic business was easily separable from its interstate commerce. All that it needed to do was to cease to sell tickets for domestic traffic, or, as Mr. Justice Holmes remarked, its cars "can be and are rolled out of it [Kansas] at will" (216 U. S. 56, 75).

Even in case of a telegraph company, this Court has held its interstate and domestic receipts to be easily capable of separation and apportionment.

Ratterman v. *Western Union Tel. Co.*, 127 U. S. 411.

The elaborate majority opinions in the *Western Union* cases do not even *mention* such a theory. The sole consideration adverted to, which was deemed at all material, was that both classes of commerce were transacted *in conjunction* with each other, and by means of the *same instrumentalities*.

Whether they could or could not be separated, or were "inextricably interwined," were clearly matters of no moment. Otherwise, these considerations would, at least, have been *mentioned*.

Nor does the *Baltic* decision, in any way, support such a theory as to the meaning of the *Western Union* cases. All that is said relating to this issue is that in the Kansas cases it appeared that the "*same instrumentalities* and the *same agencies* [were] carrying on in the *same places* the business of

the companies of State and interstate character " (231 U. S. 68, 85), whereas in the *Baltic* case these facts did not appear.

The Special Facts in the Baltic Case Showed that Its Interstate Commerce, Wholly Conducted in New York, was Not Transacted at the Same Places and by the Same Instrumentalities as Its Domestic Activities. — This is the Only Ground of Distinction from the Western Union Decision.

6. The special facts in the *Baltic* case (231 U. S. 68) showed that the domestic activities of that company, which had its financial and executive offices in Massachusetts, were kept *wholly apart* and distinct from its interstate commerce, which was wholly conducted in New York through an independent company.

No office or place of business was maintained in Massachusetts which was, in any way, used for the purposes of any kind of commerce.

The *Baltic* Company, therefore, was held not to be within the proper scope of the *Western Union* cases, which require that it must be made to appear, as here, that the same agencies and instrumentalities carry on in the same places both classes of business.

The DICTUM in Pullman Co. *v.* Adams (189 U. S. 420) is Not Law.

7. The Massachusetts theory finds its sole comfort in the unsupported *dictum*, that " the company cannot complain of being taxed for the privilege of doing a local business which it is *free to renounce*."

Pullman Co. v. *Adams*, 189 U. S. 420, 422.

The tax was there held constitutional.

Yet in the *Pullman* case (216 U. S. 56) the same company was involved.

It was equally " free to renounce " its local business, but the tax was held unconstitutional.

Evidently, this consideration was regarded as a wholly immaterial factor, as it was not even *mentioned.*

But if it is a material consideration, then the *Pullman* case (216 U. S. 56) must have overruled *Pullman Co.* v. *Adams.*

Similarly, it was also overruled by *Allen* v. *Pullman Co.* (191 U. S. 171), where the Tennessee tax of " $500 per car " was held unconstitutional, because it applied to both interstate and domestic traffic.

As stated by Mr. Justice Harlan, referring to the *Adams* and *Allen* cases:

> " Indeed, we could not hold otherwise than we do in the present case without overruling or materially modifying the principles announced in the *Allen* case."
>
> *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 44.

The " Necessary Effect " of the Kansas Tax, Measured, as It was, by Capital Stock, was Expressly Held to Result in Burdening Interstate Commerce. — The Massachusetts Tax, in Exactly the Same Terms, must have Precisely the Same " Necessary Effect, " as Applied to These Companies.

8. A tax of this description, in order to be unconstitutional, must have the *necessary effect* of imposing a substantial *burden* upon the interstate portion of the business, and not merely in an incidental or remote way.

The *Western Union* case directly held that the *necessary* effect and operation of a tax *measured by* the total authorized capital stock of the company, representing, as it does, its entire assets and business, both interstate and domestic,

was to impose a *burden* on the interstate portion of the business.

The *Baltic* case failed, because the tax, although in precisely the same terms, [except as to the maximum limit, now repealed] was held not to have the *necessary effect* of burdening interstate business, because the local activities and business were kept wholly apart from the interstate commerce and, consequently, were not transacted by means of the *same instrumentalities* and in the *same places*. This decision was not rendered because the Court held it to be necessary to show an absolute *inseparability* of the two classes of commerce. It would have been sufficient, if it had appeared that they were transacted through the *same instrumentalities* and *offices*, and in *conjunction* with each other.

Even if Capital Stock is Merely a "Measure," the Tax is Void, if the "Measure" has the "Necessary Effect of Burdening Interstate Commerce." — The Kansas Statute Used a "Measure," just like the Massachusetts Tax.

9. The measure of an excise tax, in itself lawful, may properly be found in authorized capital, or in property or the receipts from property not in themselves taxable, *provided only* that the use of such a measure does not have "the *necessary* effect of burdening interstate commerce."

Even if merely a *measure*, a tax based on a *measure* which has the *necessary effect* of burdening interstate commerce is unconstitutional.

The technical form of using capital stock as a measure, is to be disregarded. The substance and *necessary effect* of the use of such a measure, determines the question as to constitutionality.

Baltic Mining Co. v. *Massachusetts*, 231 U. S. 68, 87.
U. S. Express Co. v. *Minnesota*, 223 U. S. 335.

Kansas &c R'y Co. v. *Botkin* (decided Feb. 21, 1916).

But the *Western Union* decision expressly held that an excise in this exact form, although merely *measured* by the entire authorized capital stock, had "the *necessary* effect of burdening interstate commerce."

Accordingly, we need not argue as to the "necessary effect" of this precise form of tax, unless the *Western Union* cases are to be overruled, and this Court has repeatedly reaffirmed the soundness of those decisions.

Kansas &c R'y Co. v. *Botkin* (decided Feb. 21, 1916).

Scope of Western Union Decision Not Limited to Transportation Companies and the Like.

The only question fairly remaining open as to the meaning of that decision, is whether the scope of the *Western Union* decision is to be limited to *quasi*-public companies.

As to this question, the Massachusetts Court, as well as this Court, holds that the "commerce" clause protects equally *all kinds* of trading or other companies, so far as they are engaged in making sales of goods in interstate commerce. Its protection is not confined to transportation companies.

Upon the Record, These Companies are Transacting Both Classes of Commerce at the Same Places and Through the Same Instrumentalities, thus Differing Completely from the Baltic Company.

The only remaining question, upon the facts of the present cases, is whether the Record shows that these companies are transacting both classes of commerce conjointly through the *same instrumentalities*, and at the *same places*, as clearly

appears from the Record, or, on the contrary, whether there are any facts to justify the claim that they are keeping their interstate commerce wholly apart and *separated* from their domestic activities, as was the case with the *Baltic* Company.

A State may Not Lawfully Impose Any Condition upon a Foreign Corporation which has the "Necessary Effect" of Burdening Interstate Commerce, Whatever may be the Form or the "Measure" of Taxation Adopted.

10. It is settled law that a State has the right wholly to exclude a foreign corporation from doing a purely local business within its borders, *provided* that its interstate commerce is not thereby interfered with or burdened.

The correlative of the power to exclude, is the power to prescribe conditions on which the foreign corporation may enter upon or continue to transact such local business, *provided*, however, that no condition may be imposed which has the "necessary effect" of burdening the interstate portion of its commerce.

Baltic Mining Co. v. *Massachusetts*, 231 U. S. 68, 83.
Pullman Co. v. *Kansas*, 216 U. S. 56, 67.

A tax precisely like the Massachusetts tax, although, in form, only "measured" by capital stock, *necessarily* has the *effect* of creating a burden on interstate commerce.

Western Union Tel. Co. v. *Kansas*, 216 U. S. 1.
Pullman Co. v. *Kansas*, 216 U. S. 56.

A State Cannot Tax Interstate Commerce or Its Incidents "in Any Form."

11. A State "cannot lay a tax on interstate commerce 'in any form,' by imposing it either upon the business which constitutes such commerce, or the privilege of engaging in

it, or upon the receipts as such derived from it," or upon any of the ordinary *incidents* of such commerce or upon the *places* where conducted or upon any other agencies or instrumentalities connected with such commerce.

Kansas &c R'y Co. v. *Botkin* (decided Feb. 21, 1916).
McCall v. *California*, 136 U. S. 104.
Western Union Cases, 216 U. S. 1, 56.
Meyers v. *Wells, Fargo & Co.*, 223 U. S. 298.
Minnesota Rate Cases, 230 U. S. 352, 400, and cases cited.

Discrimination against the Right to Carry On Interstate Commerce is Equivalent to a Direct Burden.

12. " Even though a power exerted by a State, when inherently considered, may not, in and of itself, abstractly impose a direct burden on interstate commerce, nevertheless such exertion of authority will be a direct burden on such commerce, if the power, *as exercised*, operates a discrimination against that commerce, or, what is equivalent thereto, discriminates against the right to carry it on."

Pullman Co. v. *Kansas*, 216 U. S. 56, 65.
Darnell v. *Memphis*, 208 U. S. 113.
Am. Steel & Wire Co. v. *Speed*, 192 U. S. 500.

" Commerce " Clause Covers Interstate Sales of Goods. — Not Important where the Contract is Made or where Title Passes.

13. It is now conceded by the Massachusetts Court, that " the interstate commerce regulation which is under the exclusive control of Congress, and which cannot be affected by any discriminatory State law, includes not merely transportation, but the other inherently necessary incidents of purchase and sale of goods.

"Nor is it of decisive consequence in this connection where the contract is made or where the title passes."

Marconi Wireless Tel. Co. v. *Commonwealth*, 218 Mass. 558, 565, 566.
Dozier v. *Alabama*, 218 U. S. 124, 128.
Rearick v. *Pennsylvania*, 203 U. S. 507, 512.
Crenshaw v. *Arkansas*, 227 U. S. 389.
Rogers v. *Arkansas*, 227 U. S. 401.

The Maintenance of a Local Office for Purposes of Interstate Commerce does Not Subject a Foreign Corporation to State Taxation.

14. It is also now conceded by the Massachusetts Court that the maintenance of a local *office* in the State does not subject a foreign corporation to excise taxation by the State, if the office is used exclusively for purposes of interstate commerce, or for both classes of commerce, where they are "inextricably interwined."

Marconi Wireless Tel. Co. v. *Commonwealth*, 218 Mass. 558, 564, 565.

In the same case the Massachusetts Court finally concedes (p. 564), against the contentions of the Commonwealth:

(1) That this question is concluded by

Norfolk & Western R. R. v. *Pennsylvania*, 136 U. S. 114.
McCall v. *California*, 136 U. S. 104.

(2) That the following cases, heretofore much relied on as authorities against us, are no longer to be considered in this connection, and that, if they hold to the contrary, they must be regarded as overruled.

Pembina Mining Co. v. *Pennsylvania*, 125 U. S. 181.
Horn Silver Mining Co. v. *New York*, 143 U. S. 305.

The Local Business Must Be " Real and Substantial." — This Means Something More Than That Anything Exceeding a Mere " Shadow " Justifies Such an Excise.

15. The local business, for the privilege of transacting which the excise is exacted must be " real and substantial."

Baltic Mining Co. v. *Massachusetts*, 231 U. S. 68, 86.

This requirement apparently means something more than the Massachusetts Court attributed to it, namely, that it is " nothing more than a statement that a *shadow* cannot be made the basis of an excise tax."

Marconi Wireless Tel. Co. v. *Commonwealth*, 218 Mass. 558, 566.

It means, we submit, that the local privilege must be so " real and substantial " that the tax and the value of the local privilege bear some fair and reasonable relation to each other.

If, as in several of these cases, the privilege is merely technical, occasional, seldom exercised or of slight value, it is not a " real and substantial " local business, and no charge at all can be made for it.

The Massachusetts theory, on the other hand, as shown by the present cases, is that, if there is the slightest use of a local privilege, of the most technical character, like occasional directors' meetings, receipt and declaration of dividends, ownership of foreign shares by a foreign corporation, conducting correspondence, or management of property wholly outside the State, it makes no difference what the value of the privilege may be, or how much it is exercised, or whether its value or amount of exercise bear any fair or reasonable relation to the amount of the tax charged for the privilege.

It is claimed by the Commonwealth that it may exact an unlimited charge for a merely nominal privilege, even $10,000 per annum or more, as under the amended statute, in

many cases at a rate much more onerous than the Kansas tax. As the Court below says: " The State can fix its own terms, so far as license fee is concerned " (*ib.*, p. 566), if there is anything more than a mere *shadow* of local business.

The claim is made that the local privilege is very valuable, though, perhaps, exercised or enjoyed only to a very slight extent.

Trivial activities, which are made the basis for such onerous charges, as appears from the decision in these cases, show how hollow is the claim that the mere right to do bookkeeping here or to hold several directors' meetings during the year, and the like, is an extremely valuable right, for which taxes of $10,000 or more per annum should be paid.

When the functions and activities in these cases are considered, it becomes at once apparent that the value of the local privilege is highly exaggerated in the statement that " the opportunity to do business subject to the protection of our laws and with all the advantages which arise from our markets and our financial and other resources, is the thing which is made the subject of the excise."

Marconi Wireless Tel. Co. v. *Commonwealth*, 218 Mass. 558, 567.

The " Instrumentalities," Incidents and Agencies of Interstate Commerce are Fully as Much Protected as the " Commerce " Itself.

16. It is this doctrine which was completely lost sight of by the Court below in these cases, where the most trifling local activities or functions exercised in Massachusetts were seized upon, as justifying the tax, because they did not, in themselves, constitute " interstate commerce," such as the management of interstate deliveries, deposits of proceeds thereof, declarations of dividends therefrom, and general management of interstate business by means of directors' meetings.

If the *main* part of the company's business is the sale of its products in interstate trade, these additional activities are either mere *incidents* to interstate commerce or *instrumentalities* thereof, and, in either case, are as well-protected by the Constitution as is the " commerce " itself.

It is quite inconceivable that the Court below could have meant that the *Western Union* decision only applies when the business of the company is *exclusively* interstate commerce.

The *Pullman* company itself is one of the largest car manufacturing companies in the world. The manufacturing forms a very considerable part of its whole business. Its business is not confined to " commerce."

V.

THE AMOUNT OF THE TAX AND THE VALUE OR ACTUAL EXERCISE OF THE LOCAL PRIVILEGE MUST BEAR SOME FAIR AND REASONABLE RELATION TO EACH OTHER. — THE MASSACHUSETTS EXCISE IS WHOLLY " DISPROPORTIONATE " TO THE AMOUNT OF LOCAL BUSINESS AND THE PROPERTY USED THEREIN AND IS " UNDULY GREAT " WITH REFERENCE THERETO, AND IS, THEREFORE, UNCONSTITUTIONAL UNDER THE " COMMERCE " CLAUSE.

We submit that the amount of the excise tax and the value or actual exercise of the local privilege must bear some fair and reasonable relation to each other.

This seems to be a fair inference from the following statements:

Mr. Justice Day says:

> " There is no suggestion in the present record, as was shown in *Fargo* v. *Hart*, 193 U. S. 490, that the amount of the tax is *unduly great, having reference to the real value* of

the property of the company within the State and the assessment made."

U. S. Express Co. v. *Minnesota*, 223 U. S. 335, 348.

The *Western Union* opinion refers to a tax in another case which, as Mr. Justice Harlan says, was "not at all *disproportioned* to such local business and, therefore, not to be regarded as a mere *device* to reach or burden the interstate commerce of the company."

Western Union Telegraph Co. v. *Kansas*, 216 U. S. 1, 42.

The Court below, referring to these statements says:

"These tests well may be used as aids in determining whether the general scheme of an excise statute is an honest attempt to raise legitimate revenue, or whether it is 'a mere device to reach and burden the interstate commerce of the company.' But when the general scheme of the statute has been upheld as not out of harmony with the Federal Constitution, then it cannot be stricken down, because in a particular instance the excise may seem large."

Marconi Wireless Tel. Co. et al. v. *Commonwealth*, 218 Mass. 558, 567.

See

S. S. White Dental Mfg. Co. v. *Commonwealth*, 212 Mass. 35, 44.

The Scheme of the Massachusetts Statute Necessarily Involves Oppression and Excessive Taxation. — As Administered, a Tax of $2,000 per Annum ($10,000 or More, under the Present Statute) is Charged for the Slightest or Most Trivial Exercise of a Local Privilege, because, According to its Unfair and Oppressive Scheme, the Amount of the Tax is Made Wholly Dependent on the Technical Privilege Granted, Regardless of the Extent to which It is " Actually " Exercised and of the Amount of " Actual " Local Business.

Here, however, more than an individual or occasional case of excessive taxation is involved.

The general scheme, as applied to these and numerous similar corporations, normally and usually involves oppressive and excessive taxation, because it is " unduly great " and wholly " disproportioned " to the amount of the local business or the value of the local privilege.

This result naturally follows from the claims made by the Commonwealth to the effect that the amount of the excise ($2,000 per annum or less) is justified because of the value of the privilege granted, and that it is of no consequence how much or how little it may *actually* be *exercised*.

Inequality and oppression naturally result from holding that the payment of the excise is exacted for the mere *privilege*, that it is not dependent on the extent to which the privilege is *actually exercised* and does not vary according to changes in the comparative situation of the several companies, for, under such a ruling, it matters not whether one or ninety-nine per cent of their Massachusetts commerce consists of local business.

This is wholly different from the rational method used in Massachusetts of taxing railroad, telegraph and telephone companies on the basis of their proportionate lines located in that State.

It also differs radically from the fair method adopted by Kansas after the *Western Union* decision, making the excise

of a foreign corporation assessable upon " that proportion of such foreign corporation's issued capital stock as is devoted to its Kansas business." This new act has recently been sustained.

Lusk et al. v. *Botkin* (decided Feb. 21, 1916).

The result of the holding of the Court below, is that the tax is fixed at a large figure ($2,000 per annum, under the original statute, as a maximum, and $10,000 or more per annum now) for the slightest or most trivial *actual exercise* of local activities or functions, simply because the *privilege* is granted, to be exercised to the extent desired.

The Scheme of the Massachusetts Tax is Shown to be Absurd, Excessive and Oppressive, as Applied in Cheney Brothers Case, Where $1,400 per Annum is Charged for the Privilege of Filing and Forwarding Copies of Connecticut Orders through Its Boston Office, which is Otherwise Wholly Devoted to the Uses of Interstate Commerce.

The whole system becomes absurd, when applied to the *Cheney Brothers* case, where a tax of $1,400 per annum is exacted for a local privilege limited to forwarding to Connecticut through the Boston office copies of such orders, *if any*, as may have been taken in Connecticut from purchasers residing there.

Even under the theory of the Court below, to the effect that anything more than a mere " shadow " is a " real and substantial " local business, as required by the *Baltic* decision, and justifies the tax, we submit that the Court rested its decision merely on a " shadow," when it sustained the $1,400 annual tax against *Cheney Brothers Company* solely because of the supposed fact that at its Boston office, where all *business* transacted was confessedly interstate commerce, occasional orders for goods were *registered* and *transmitted* to

its main office in Connecticut, these orders relating in no way to Massachusetts business, but covering contracts for sales deliverable from the Connecticut factory and entered into in Connecticut between sellers and purchasers residing in that State. Since such transactions, if they occurred, would not constitute interstate commerce, but would be local business transacted in Connecticut, with which Massachusetts is in no way concerned, a tax of $1,400 is exacted, because one of its salesmen, traveling in Connecticut, may have happened to take such an order and to record it in the books of the Boston office and transmit it to the main office in Connecticut (218 Mass. 558, 570, 571).

Inferences by the Lower Court in the Cheney Brothers Case are Very Much Forced and do Not Represent the Facts. — Upon Agreed Facts, the Court has No Right to Draw Any Inferences, Unless Such Right is Reserved.

It is not necessary to suggest that this alleged state of facts is a forced inference from the only fact stated in the Record with respect to these matters, namely, that the salesmen, having their headquarters in Boston, " cover " New England, or that no such cases have ever, in fact, existed. It would be sufficient to state, as to this inference, that, under the well-settled Massachusetts rule, no inferences whatever can be drawn by the Appellate Court, where a case is submitted upon agreed facts, unless the right to draw inferences is expressly reserved by the agreed facts.

Boston v. *Brooks*, 187 Mass. 286.

Trivialities and Technicalities are Picked Out as the Basis for this Massachusetts Excise. — No "Real" or "Substantial" Local Business is Shown, in Several of These Cases. — The Tax is "Unduly Great" and "Wholly Disproportioned" to the Real Value of the Local Privilege. — As Applied to These Cases, It is a Mere "Device" to Reach the Revenues Derived from Interstate Commerce.

This forced method of picking out more or less trivial facts, for the purpose of showing some slight activity or function, though not properly business, which is exercised in Massachusetts, is shown in several of these cases, in order to justify an excise imposed without reasonable basis, and to an excessive amount. This clearly indicates, we submit, a complete misapprehension of the meaning of this Court in the *Baltic* case, when it stated that the local business must, at least, appear to be "real and substantial."

In several of the present cases, it is clearly apparent that the amount of the charge for the local privilege is unreasonable, excessive, "unduly great" and "wholly disproportionate" to the amount of local business done and to the value of the privilege charged for.

This method of applying and enforcing the Massachusetts excise necessarily involves an arbitrary discriminating tax which rests upon no reasonable basis and offends against "equal protection of the laws," by favoring some foreign corporations and injuring others, simply because the wrong basis is adopted through wholly disregarding the extent of the *actual exercise* of the privilege, and by making possible a tax of $10,000 per annum or more, simply because of some technical or trifling use or exercise of the privilege.

Undue Size and Disproportionateness of the Tax are Illustrated also in the Lanston Case.

The *undue* size of such a tax is sufficiently illustrated by the *Lanston Monotype* case, where the total profit on the

business throughout New England amounts to $2,400 per annum (Rec. 12) and the strictly local business may fairly be assumed to amount to one half that amount, or $1,200, and a tax of $2,000 per annum is exacted for this privilege.

If Massachusetts can charge these extravagant rates, all the other States may do the same, with disastrous results to interstate commerce.

These criticisms as to the unreasonable basis and undue size of the Massachusetts excise, are not fully met by the statement of the Court below of the obvious proposition, that " the mere fact that some foreign corporation may not be able to make profits enough to meet it, does not render the law unconstitutional as to that corporation " (218 Mass. 558, 566).

But, on the other hand, where, as here, not one only, but many cases can be shown where the law operates harshly, and allows excessive taxation, in view of the lack of *real value* in the local privilege, and the amount of the excise is assessable on a wholly unreasonable basis, which is not dependent at all on the amount or extent to which the privilege is *actually exercised*, we may fairly conclude that the amount of the tax is wholly " disproportioned to such local business," and is, consequently, unconstitutional.

Western Union Telegraph Co. v. *Kansas*, 216 U. S. 1, 42.

These are absolute tests of the constitutionality of such a tax. Unless the tax and the value of the local privilege bear some *fair* and *reasonable relation* to each other, the tax must fall, as being " unduly great " and " disproportioned to such local business," under the decisions of this Court above referred to.

Our request for a ruling to this effect (4th Ass't. Errors — Rec. 50) should have been granted.

The Court below, however, only admits that these tests may be used as " aids " in determining whether an excise

statute is a " mere device to reach and burden the interstate commerce of the company " (218 Mass. 558, 567).

The application of these tests, in several of these cases, shows beyond question that the Massachusetts system actually operates as such a " device," whatever may be its declared purpose.

For no attempt whatever is here made fairly to apportion taxes between interstate and local business or, as with railroad and telegraph lines in Massachusetts and the new Kansas foreign corporation excise, to make the local excise depend on the proportionate extent of the local lines, as compared with total mileage, or to make the amount of the excise " proportioned " to the extent of local business or to the *actual exercise* of the privilege or to its value. It follows that the amount of the tax is wholly " disproportioned to such local business."

If 1% of a company's Massachusetts business represents local commerce, the excise is precisely the same as if its local business amounted to 99%.

Trivial Local Activities are Shown in Champion Copper Case.

So, also, as in the case of the *Champion Copper Company*, if no profit-producing business whatever is locally conducted, but only technical or trivial activities, like bookkeeping, managing interstate sales or deliveries, holding occasional directors' meetings, the payment must come, if at all, out of the receipts from interstate commerce, for it has no other source of income.

In several of these cases the amount of local business is so small that the large and excessive tax *must* obviously be paid either partly or wholly out of the receipts from interstate commerce. If so, it *directly burdens* such receipts.

This Tax System Involves Gross Inequalities; also a Total Lack of Relation between the Size of Tax and the Amount of Local Business.

The system obviously creates gross inequalities, as in the *Northwestern* case, where the local business is only 1% of the total business transacted in the State (Rec. 17).

But it is more than inequality of which we complain.

It is the total lack of any relation whatsoever between the amount of the tax and the value of the privilege which renders this excise "unduly great" and wholly "disproportioned" to the amount of local business and the value of the local privilege.

Disproportionateness is Quite Apparent in Lanston and Locomobile Cases.

This disproportionateness is quite apparent in the *Lanston* and *Locomobile* cases.

In the former, an annual tax of $2,000 is paid for the privilege of keeping in stock in Massachusetts, and selling emergency repair parts of type-setting machines, at a total net profit of $1,200 to $2,400 per annum, nearer the former figure (Rec. 12).

This profit represents no return whatever on any proportion of the $10,000,000 capital, after payment of the tax.

In the *Locomobile* case, the local repair business is comparatively trifling, in all $7,500 per annum (Rec. 16), with profits which may fairly be assumed to be little, if any, more than the amount of the tax.

The sale of used cars is also relatively small, one sixth of the total business done here (Rec. 16).

Cheney Brothers Case.

In the *Cheney* case, no local *business* is transacted. *Possibly* some Connecticut orders may here be copied, recorded

in its books and forwarded. In addition, a stock of samples is kept, for exhibition to interstate customers, which surely must be one of the ordinary incidents of interstate commerce, but, if not, is a trifling local privilege.

The samples might readily be carried around by the traveling salesmen, as is ordinarily the custom.

Up to this point the facts of these cases present little basis for the extravagant claims made as to the *value* of the local privilege, for it professes to be exacted for the "commodity or privilege of having an establishment for business in Massachusetts, with the *protection* of our laws and the *financial* and *other advantages* of a situation here."

Baltic Mining Co. v. *Commonwealth*, 207 Mass. 381, 388.

S. S. White Dental Mfg. Co. v. *Commonwealth*, 212 Mass. 35, 40.

These considerations sound like a mere pretext for an exorbitant tax, when applied to the extremely slight use or exercise of a purely technical or nominal privilege which is exercised by the *Cheney Brothers* Company.

Copper Range Company Transacts No Commerce.

In the *Copper Range* case, it transacts no *commerce* in Massachusetts or elsewhere, being a holding company (Rec. 17, 18).

It has no office of its own in this State.

Three or four directors' meetings per annum are held here.

It keeps books of account and records.

It owns mineral lands in Michigan.

It receives dividends from its stockholdings in foreign corporations, deposits them here, and out of them pays dividends on its own shares.

It transfers no stock here.

Its president and treasurer reside here.

The *situs* of its stockholdings is clearly at the home of the corporation, and not in Massachusetts.

Champion Copper Case.

In the *Champion Copper* case, considerably more local activity appears, which will all be shown to be purely *incident* to its interstate business and confined to the management of interstate sales and deliveries, the handling of funds derived from interstate sales, and matters incident thereto.

But, if not, the functions here exercised are of a nominal or technical nature and bear no reasonable relation, in value, to the charge of $500 per annum exacted for the nominal privilege of having a treasurer's office here in charge of interstate deliveries, holding several directors' meetings in a year, receiving and depositing revenues from interstate sales, declaring dividends therefrom, and managing a mine in Michigan (although the facts show that the management thereof is, in fact, exclusively in the control of the general manager in Michigan) (Rec. 22, 23).

We submit that the amount of the excise and the real value of the local privilege exercised must bear some *fair* and *reasonable relation* to each other, and that, if the amount of the tax is " unduly great " or " disproportioned " to the value of the privilege, the tax cannot be justified (4th and 5th Ass'ts. Error — Rec. 50).

The facts of these cases show that the tax is " unduly great " and wholly " disproportioned " to the value of the local privilege, and is plainly a "*device* to reach and burden " the interstate profits of these and other foreign corporations, for such profits are actually and necessarily reached in several of these cases.

VI.

ALL THE USUAL AND FAIR INCIDENTS TO INTERSTATE COMMERCE ARE PROTECTED BY THE "COMMERCE" CLAUSE, EQUALLY WITH THE COMMERCE ITSELF. — INCLUDED WITHIN SUCH PROTECTION ARE THE *Office* OR PLACE OF BUSINESS USED FOR PURPOSES OF SUCH COMMERCE, THE STOCK OF SAMPLES AND THE EXHIBITION THEREOF AT SUCH PLACE, THE MANAGEMENT OF SUCH COMMERCE, THE BANKING OF PROCEEDS THEREFROM, DECLARATION OF DIVIDENDS THEREFROM, DIRECTORS' MEETINGS DEALING THEREWITH, BOOK-KEEPING AND CLERICAL WORK CONNECTED THEREWITH, AND, IN GENERAL, ALL INSTRUMENTALITIES, MEANS AND FUNCTIONS, *fairly incident* TO INTERSTATE COMMERCE.

If, as is settled law, interstate commerce is protected from such excise taxation by the "commerce" clause, it necessarily follows that all transactions, instrumentalities, means and functions *reasonably and fairly incident* to such commerce are equally protected.

Nor can they be made the basis of such an excise directly or indirectly.

True it is that property used in interstate commerce may be taxed locally in the same way as other classes of property. But no discriminatory excise can be exacted which has the "necessary effect" of burdening interstate commerce or any of its instrumentalities or incidents.

The extended application of the "commerce" clause is thus stated by Pomeroy, and the statement is approved in *McCall* v. *California* (136 U. S. 104, 108):

> "It includes the fact of intercourse and of traffic and the subject matter of intercourse and traffic. The fact of intercourse and traffic again embraces all the *means, instruments* and *places* by and in which intercourse and traffic are carried on, and further still comprehends the

act of carrying them on at these places, and by and with these means. The subject matter of intercourse or traffic may be either things, goods, chattels, merchandise or persons.

"All these may therefore be regulated [i. e., by Congress, but not by any State]."

Pomeroy Constitutional Law, Sec. 378.

Even the Court below admits to some extent the soundness of the proposition that the *incidents* of interstate commerce are protected by the "commerce" clause equally with the commerce itself.

But it limits such protection to incidents "reasonably necessary" to such commerce.

No incidents are *absolutely necessary* to such commerce. Few are *reasonably necessary*. Most incidents could be abandoned and still have such commerce go on.

The Court below should have gone further and extended the protection to all instrumentalities, means, activities or functions *fairly incident* to interstate commerce.

The Court below, in the *Pocahontas Fuel* case, expresses its views thus:

"The keeping of an office and a local bank account and the employment of a stenographer are *incidental* instrumentalities *reasonably necessary* to the conduct of this interstate commerce, and *hence inseparable* from it."

Marconi Wireless Tel. Co. v. *Commonwealth*, 218 Mass. 558, 569.

Yet no one would claim that it is *impossible* to conduct the same volume of interstate commerce without the aid of a stenographer.

As is apparent, even in matters *fairly* and *reasonably incident* to interstate commerce, the Court below cannot get rid of its preconceived theory that the domestic and interstate commerce must be "inextricably intertwined."

No incident of interstate commerce can ever be said to be indispensable to it, or *wholly inseparable* from it.

The keeping of a local bank account or even a local office is not absolutely *inseparable* from such commerce.

Such means or instrumentalities are an aid or a convenience, not a necessity. Such commerce is frequently carried on without their aid, through itinerant " drummers."

The commerce could still be conducted without their aid. The company is " free to renounce " the use of them.

Indispensability or *necessity* cannot be the proper test.

The only requirement should be that the activity must be *fairly* and *reasonably incident* to interstate commerce.

The Court, further, states its views of the proper test thus:

> " The distinction is not whether a profit is made by the conjoining and a loss suffered by separating the intrastate and interstate commerce, but whether the nature of the business is such that the company is *free to renounce* the domestic business, if it chooses, and still conduct its interstate commerce [still following the discredited *dictum* from *Pullman Co.* v. *Adams*, 189 U. S. 420, 422, which, if ever law, was overruled by the *Pullman* case, 216 U. S. 56]."
>
> *Marconi Wireless Tel. Co.* v. *Commonwealth*, 218 Mass. 558, 572.

This statement is followed by the remark that the *Baltic* decision, as quoted from, is " aptly expressive," as if it in any way supported such a theory, when, in fact, it renders no countenance whatsoever to it.

The quotation from the *Baltic* case requires that the local business or activities, in order to justify such an excise, must be —

(1) " real and substantial "; and

(2) " not so *connected with* interstate commerce as to render a tax upon it a *burden* upon the interstate business."

Baltic Mining Co. v. *Massachusetts*, 231 U. S. 68, 86.

The *fair* incidents to interstate commerce are " connected with " it, in this sense, and not merely the *necessary* incidents.

A tax on an *incident* is necessarily a burden on the commerce itself.

If bookkeeping, stenographers, local bank deposits, directors' meetings, management or other means or instrumentalities are *fairly incident* to interstate commerce here, to say that they must be abandoned, or to exact an excise because of them, is necessarily a *direct burden* on such commerce, because it handicaps and renders less convenient, and, ordinarily, more expensive the transaction of such commerce.

The only proper question in this connection is, are the activities and functions in question *fairly* and *reasonably incident* to interstate commerce?

If so, they are " so *connected with* interstate commerce as to render a tax upon it [the incident] a *burden* upon the interstate business," in accordance with the requirements stated in the *Baltic* decision (*supra*).

All of the functions here relied on are mere *incidents* to interstate commerce. Many of them are also *instrumentalities* by means of which such commerce is conducted.

Confessedly, if it is an *instrumentality*, it is protected by the " commerce " clause.

No inquiry is, therefore, required as to whether an *instrumentality* is " reasonably necessary " to, and " hence inseparable from," the interstate commerce, which the Court below deemed to be the proper inquiry in all cases.

It obviously suffices to show the mere fact that it is an *instrumentality* or one of the *means* of conducting interstate commerce.

Pomeroy Constitutional Law, Sec. 378 (*supra*).

The real *business* of certain of these companies is exclusively interstate in character.

All that of the *Champion Copper* Company consists of sales made in New York deliverable in the various States from the smelter (owned by another corporation) in Michigan.

All *business* of the *Cheney Brothers* in Massachusetts consists of the negotiation of sales for delivery from its Connecticut factory.

Are the local activities or functions exercised by these companies in Massachusetts *fairly incident* to their *business*, which is exclusively of an interstate character?

Various local activities or functions are admitted by the Court below to be mere incidents to interstate commerce, the *business* transacted in Massachusetts being exclusively interstate.

So it was held in the *Pocahontas Fuel* case (218 Mass. 558, 568, 569) as to —

1. Keeping a local office or *place* of business for purposes of interstate commerce.
2. Keeping a local bank account.
3. Employment of a stenographer.
4. Having a local manager in charge of New England business.
5. Using the local office for the headquarters and use of one manager and one salesman.
6. Correspondence and telephoning from this office respecting sales.
7. Making contracts and arranging charter parties.
8. Keeping at this office records of sales.

These are all held to be " reasonably necessary " incidents to interstate commerce.

Yet not one of these activities is indispensable and *absolutely* or *reasonably necessary* to and *inseparable* from such commerce, which obviously could be conducted in the same volume without these aids or in some other way.

Although the entire revenue-producing *business* in Massachusetts was interstate in character, the Court below held,

on the other hand, that the following local activities or functions (*a*) constituted *business* and (*b*) were not mere *incidents* to the interstate business: —

Office and Sales-Room Used solely for Purposes of Interstate Sales is Protected from Taxation by "Commerce" Clause.

The keeping of an office and salesroom for the headquarters and use of one office salesman and four traveling salesmen is the fact relied on by the Commonwealth in the *Cheney* case.

All sales made in Massachusetts, or negotiated at or through this office, were deliverable from the Connecticut factory, and were, consequently, interstate (*Cheney Brothers* case).

It is difficult to see how this office was, in any way, differentiated from the *Pocahontas Fuel* case, where one manager and one salesman used the office as their headquarters for the purpose of making interstate sales partly inside and partly outside of the office and "who travel to see prospective purchasers or communicate with them by telephone or letter from its Boston office" (218 Mass. 558, 569).

Surely, it cannot be maintained that it is differentiated by the fact that only one managing salesman was employed at the *Pocahontas Fuel* office, and used the office solely for the purposes of his interstate sales.

Obviously, if an office is used exclusively as an instrumentality of interstate sales, a salesman there employed in making such sales is also such an instrumentality, and his activities are equally well an ordinary incident to such commerce.

The Maintaining of Such an Office or Sales-Room as a Resort for Interstate Customers.

In the *Cheney* case it is difficult to see the distinction between the customers resorting to the office for purposes of interstate trade and using the office as a headquarters for visiting the customers for the same purposes, as in the *Pocahontas Fuel* case, or how the latter case was bettered by the fact that the office was used for the purpose of communicating with prospective purchasers and for the purpose of negotiating such sales " by telephone or letter from its Boston office " (218 Mass. 558, 569).

In any event, the office of *Cheney Brothers* was so used solely for purposes of interstate sales and commerce. The customers resorted to it for these purposes and for no other purposes.

It was so used as one of the means or *instrumentalities* for increasing sales.

It comes directly within the authority of

McCall v. *California*, 136 U. S. 104.

Norfolk & Western R. R. Co. v. *Pennsylvania*, 136 U. S. 114.

McCall *v.* California, 136 U. S. 104.

In this case the San Francisco Municipal License Tax, assessing upon " every railroad agency twenty-five dollars per quarter," was held to be repugnant to the " commerce " clause, when applied to a railroad agent who maintained his *place* of *business* in San Francisco and there solicited passenger traffic, as the agent for a railroad operating between Chicago and New York, but having no railroad lines in California. The agent sold no tickets. His only duty was to induce people contemplating a trip East to book from Chicago to New York over the line he represented.

In its opinion the Court directly answers the proposition

stated in the *Baltic* opinion (207 Mass. 387, 388, 389), to the effect that the Massachusetts office was not *essential* to its interstate commerce, and might readily be given up or "freely renounced," without injury to or effect upon its interstate business. The Court there says (p. 111):

> "The reply to this proposition is, that the *essentiality* of the business of the plaintiff in error to the commerce of the road he represented, is not the test as to whether that business was a part of interstate commerce. It may readily be admitted, without prejudicing his defence, that the road would continue to carry passengers between Chicago and New York, even if the agent had been prohibited altogether from pursuing his business in California. The test is — Was this business a part of the commerce of the road? *Did* it *assist, or was it carried on with the purpose to assist, in increasing the amount of passenger traffic* on the road? If it did, the power to tax it involves the lessening of the commerce of the road to an extent commensurate with the amount of business done by the agent."

Norfolk & Western R. R. Co. *v.* Pennsylvania, 136 U. S. 114.

If the *Pembina* case (*infra*) means anything more than hereinafter stated, it is directly in conflict with the *Norfolk & Western* case, and must be regarded as overruled by the later case. Here the same Pennsylvania statute was passed upon as was involved in the *Pembina* case. The statute was held unconstitutional, as applied to a foreign railroad corporation which maintained such an *office* in Pennsylvania. The company had no main or branch lines within Pennsylvania, but, by virtue of connections with other railroads and traffic contracts, had become a link in a through line of road which, as a part of its business, carried freight and passengers into and out of Pennsylvania.

Mr. Justice Lamar there says (p. 120):

> "What was the purpose of the company in establishing an office in the city of Philadelphia? Manifestly, for

the furtherance of its business interests in the matter of its commercial relations. . . . That office was maintained because of the necessities of the interstate business of the company, and for no other purpose. A tax upon it was, therefore, a tax upon one of the *means* or *instrumentalities* of the company's *interstate commerce;* and as such was in violation of the commercial clause of the Constitution of the United States."

Pembina Mining Co. *v.* **Pennsylvania, 125 U. S. 181.**

In this case no question as to interstate commerce was involved.

The Pennsylvania statute here upheld prohibited any foreign corporation from having a office in that State " for the use of its officers, stockholders, agents or employés," unless it should first obtain a license and pay a license fee annually of " one fourth of a mill on each dollar of capital stock which said company is authorized to have."

The company was organized under the laws of Colorado " for the purpose of carrying on a general mining and milling business " in that State. Its principal office was in Colorado. It had an office in Pennsylvania " for the use of its officers, stockholders, agents and employés."

Upon the facts stated there was nothing to indicate that the company attempted to do any interstate business in Pennsylvania. It merely maintained an office there.

It did not appear whether or not it there sold any of its products for delivery outside of that State, or there superintended or managed interstate sales or deliveries.

Whether it was engaged in interstate commerce anywhere was not shown.

The only stated object of the use made of this office in Pennsylvania, is that it was maintained " for the use of its officers, stockholders, agents and employés."

The Court, in sustaining the statute, did not consider that any question of interstate commerce was involved.

Mr. Justice Field there says (p. 189):

> "The State is not prohibited from discriminating in the privileges it may grant to foreign corporations, as a condition of their doing business or hiring offices within its limits, *provided always such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce.*"

The inapplicability of the *Pembina* case to cases where interstate commerce is involved is specially pointed out in *McCall* v. *California* (136 U. S. 104), where the Court says (p. 112):

> "This Court held [in the *Pembina* case] that the State legislation in question did not infringe upon the commercial clause of the Constitution, because it imposed no prohibition upon the transportation into the State of the products of the corporation or upon their sale in the State, but simply exacted a license tax from the corporation for its office in the Commonwealth."

There was nothing whatever to indicate that the Pennsylvania office was in any way used for purposes of interstate commerce.

Horn Silver Mining Co. *v.* **New York, 143 U. S. 305.**

This case presented no question involving interstate commerce. The license tax was there attacked by a foreign corporation attempting to carry on a manufacturing business there, without payment of the license tax assessed for that privilege.

As to the *Horn Silver* case, Mr. Justice White says, in his concurring opinion (216 U. S. 56, 71), that it "involved no question of interstate commerce, but the right of a foreign corporation to carry on in a State a manufacturing business, without compliance with the laws of the State."

Keeping and Exhibiting a Stock of Samples for the Sole Purpose of Negotiating Interstate Sales are also Protected from State Taxation by the "Commerce" Clause.

In the *Cheney* case, the samples could not have been kept for any purpose other than interstate commerce, because all sales there negotiated or made involved delivery from the Connecticut factory.

The suggestion that some Connecticut customer might *possibly* have examined samples at this office finds no support from any fact stated in the Record.

Upon a case stated, no inferences whatsoever are allowed to be drawn, under the settled Massachusetts rule, unless the right to draw inferences is expressly reserved.

Boston v. *Brooks*, 187 Mass. 286.

If any isolated or occasional visit of this kind could properly be inferred, it could not, in any event, control the *main* purpose for which this office and the stock of samples were used, namely, for purposes of interstate trade exclusively.

An *office* used solely for purposes of interstate commerce, is clearly protected by the "commerce" clause, because it is an *instrumentality* of such commerce.

McCall v. *California* (supra).

Norfolk & Western R. R. Co. v. *Pennsylvania* (supra).

The maintenance and exhibition of a stock of samples at such an office, for the purpose of extending and increasing interstate sales and commerce, comes equally within the authority of these cases.

Such samples, when used exclusively for the purposes of interstate trading, are an *instrumentality* or means of extending interstate commerce.

In any event, the use of them is a matter *fairly incident* to such commerce.

It matters not that the exhibition of samples is not *absolutely* or *reasonably necessary*, so long as it is, in fact, a mere *incident* to the interstate business.

Recording Orders Negotiated Outside of the State, is Not Local Massachusetts Business.

The recording at a local office of orders, *if any*, received in Connecticut from a Connecticut customer and the forwarding of such orders to the home office in Connecticut, are not sufficient grounds for local taxation, where the business transacted in Massachusetts consists exclusively of interstate sales (*Cheney* case).

Such occasional and trivial use of an office, if it could properly be inferred from the bare fact stated in the Record that the company's traveling salesmen "cover" New England, could not fairly be held to constitute a *business*. Nor could they convert the *place* where such activities are conducted into an "usual place of business" for these trifling purposes, such as the Massachusetts statute requires, as a condition precedent to any excise tax.

Superintendance and Management of Interstate Deliveries, are also Protected by the "Commerce" Clause, Both as Mere Incidents to and as Instrumentalities of Interstate Commerce.

In the *Champion Copper* case all the revenue-producing *business* of the company consists of interstate sales, the deliveries under which are superintended and managed wholly from the Boston office.

Its contracts of sale are made exclusively by the selling agent in New York (Rec. 20).

They all involve deliveries from the smelter in Michigan (Rec. 20).

The selling agent "has no supervision or direction of deliveries of goods sold or agreed to be sold" (Rec. 20, 21.)

"Deliveries, under contracts of sale entered into by the selling agent, are exclusively under the direction, supervision and control of the treasurer's office of the copper company in Boston" (Rec. 20, 21). The details as to methods of selling, delivering and ordering deliveries, are fully stated (Rec. 21).

No selling occurs in Massachusetts.

The interstate *business* in Massachusetts consists chiefly in ordering deliveries under interstate sales, and in superintending and managing the same.

The fact that the company also transacts other business (mining or smelting) outside of Massachusetts, clearly cannot change the character of the business done within this State.

Interstate deliveries, and the *superintendence* thereof, are plainly *means* or *instrumentalities* of carrying on interstate commerce, for otherwise it cannot be carried on.

They are as much an integral part of interstate commerce as the negotiation of sales.

But if not, they are obviously *mere incidents* to the commerce itself, and equally protected by the "commerce" clause from State taxation, or from being regarded as a proper basis for such an excise.

The Maintenance of a Treasurer's Office in Connection with the Company's Business in Massachusetts, Which Consists Exclusively of the Management of Interstate Deliveries and the Handling of Funds Derived from Interstate Sales, Furnishes No Proper Basis for This Excise, Because Such Functions are Protected by the "Commerce" Clause.

All the revenue-producing business of the *Champion Copper* Company consists of interstate sales made in New York and deliveries thereunder ordered and superintended from Boston.

If the sales and deliveries are wholly interstate commerce, the revenues derived therefrom must equally be protected.

It would be a novel proposition, if the State could reach the revenues of interstate commerce, when it could not touch the commerce itself, or could use the fact that such revenues were received and handled in Massachusetts as the basis of such an excise.

If so, the protection of the "commerce" clause is wholly illusory.

Funds derived from interstate sales must be deposited at places other than the home of the corporation.

These revenues are mere *incidents* of interstate commerce.

In order that no unwarranted inferences may be indulged in, the Record distinctly states that "the treasurer's office in Boston is maintained and used for the purposes stated herein, and *for no other purposes*" (Rec. 22).

Depositing Funds Derived from Interstate Commerce, Distributing Them by Way of Dividends and the Necessary Book-keeping and Clerical Work, are Mere Incidents to Interstate Commerce, and Consequently Protected by the "Commerce" Clause from Being Used as the Basis or Excuse for State Taxation.

The same considerations which protect the "receipts as such derived from" interstate commerce (*Kansas City &c R'y Co.* v. *Botkin*, decided Feb. 21, 1916) require also the elimination of the incidental functions used here as an excuse for State taxation. If the "receipts" of interstate commerce cannot be touched, the handling of such receipts cannot serve as the basis for State taxation. The facts here relied on by the Commonwealth in the *Champion Copper* case may be summarized thus:

(*a*) Depositing such interstate receipts in banks;

(*b*) Distributing them as dividends;

(*c*) The book-keeping and clerical work incident thereto;

(*d*) The receipt from its New York selling agent of collections made as the result of interstate sales;

(*e*) The receipt of reports from its selling agent as to interstate sales;

(*f*) Correspondence with reference thereto.

All of these are *fairly incident* to the interstate business.

That all of the special functions in these cases (if *business* at all) are mere *incidents* of the regular corporate business, is shown by

People v. *Equitable Trust Co.*, 96 N. Y. 387.
People v. *Horn Silver Mining Co.*, 105 N. Y. 76.
People v. *Roberts*, 50 N. Y. Supp. 355.

We come now to the statement of the Court below in the *Champion* case, that a "*considerable portion* of the business transacted in Boston relates to matters quite unrelated to interstate commerce" (218 Mass. 558, 578).

We respectfully ask that it be pointed out specifically *what* portion.

For the Court clearly cannot rest its conclusion on the maintenance of a treasurer's office, with the activities here shown.

Management of Interstate Business and Handling Funds Derived therefrom do Not Constitute a Proper Basis or Excuse for State Taxation.

The Court below says (p. 578):

> "It may be an interesting question whether a foreign corporation can select any place attractive from financial, economic or other reasons, and establish there the *management* of all its interstate commerce, and seek immunity from any license for this privilege under the "commerce" clause of the Federal Constitution, *when there is no direct connection* between such place and its interstate commerce." (218 Mass. 558, 578.)

It is difficult to see how there can be any more *direct connection* (if that be important) than is shown in a case where an office is established and used solely for purposes of interstate deliveries and handling the revenues derived from interstate commerce.

The Court adds (p. 578) that it does not understand that the *McCall* and *Norfolk & Western* cases (*supra*) go to this extent. We understand that they do, and claim that a foreign corporation may enter the State and establish an office there for the *management* of its interstate commerce, whether by managers, officers or directors, as was directly held in the *Norfolk & Western* case, under the statute prohibiting such a local office " for the use of its officers, stockholders, agents or employés."

The Court continues (p. 578):

> " But it is not necessary to discuss this question nor to determine whether the exercise by the treasurer [of authority?] over the sales agent and the other instrumentalities of sale constitutes interstate commerce [we do not so contend, but that it constitutes the *management* of interstate commerce and one of its ordinary *incidents*] because, apart from these considerations, the *corporate activities*, conducted at Boston constitute a doing of business which has no direct relation to commerce."

Now precisely what is meant by this?

Apparently nothing beyond what the Court states:

> " The entire corporate *potentiality* dwells in the Boston office. Its executive officers are there.
>
> " The responsibility for its management as a corporation rests upon those whose headquarters are there " (p. 579). (Apparently neglecting the fundamental responsibility of the stockholders at the home of the corporation in Michigan.)

If the treasurer's activities at this local office in managing, or dealing with the *business* of interstate deliveries, and in handling the revenues derived solely from interstate sales,

do not warrant such an excise, it surely makes the case no better to say that, dealing with the *same business*, the president and directors are also here and *manage* the *same business* and declare dividends from the receipts derived exclusively from interstate business.

We submit that the Court below was utterly inconsistent in dealing with the question of *management* of interstate business at a local office.

A foreign corporation may have at its local office in Boston a " manager who has charge of New England business," without becoming liable to this excise, as was held in the *Pocahontas Fuel* case (218 Mass. 558, 568).

But, apparently, the fact that it employs a higher grade of *manager*, makes it liable.

If the *management of interstate business* is carried on by a treasurer, a president or a board of directors, such *management* makes the company liable to an excise tax, as was held in the *Champion* case.

Such a distinction cannot be made out or supported.

Moreover, the excise does not profess to be based on " potentiality."

The question is, whether the board of directors, in its management of interstate deliveries and of the receipts derived exclusively from interstate commerce, is *actually* carrying on a local business here and maintaining an " usual place of business " for purposes of domestic trade.

Unless that be the case, it can make no legal difference, to assert that the board of directors represents the stockholders and has *potential* authority and power to manage the mine in Michigan, although such authority has never, in fact, been exercised by the Board, but has been expressly delegated to the general manager residing in Michigan (Rec. 22, 23).

The *Champion* decision must rest solely on the claim that the *Pembina* case is still law on this issue (218 Mass. 558, 579), although the Court below had already disposed of that

case completely as an authority in the *Pocahontas Fuel* case (218 Mass. 558, 564) by following the *McCall* and *Norfolk & Western* decisions, and had reached the conclusion that the "maintenance by a foreign corporation of a local *office*" with a local manager "solely for use in interstate commerce does not render it liable to" this excise tax (*ib.*, 565).

Referring especially to an office where samples are kept (*Cheney* case), the Court below quotes the dissenting opinion in *Robbins* v. *Shelby County Taxing District* (120 U. S. 489, 500) as follows:

> "I cannot believe that if Robbins had opened an *office* for his business within the Taxing District, at which he kept and exhibited his samples, it would be held that he would not be liable to the tax."

The Court below was evidently much affected by this statement. It says (*ib.*, p. 570):

> "These words were used in a dissenting opinion. But they embody a thought by way of hypothesis which evidently was regarded as too plain to be challenged."

This statement, however, has never since been attempted to be supported. It is plainly erroneous. It has repeatedly been held that local agents engaged in interstate commerce cannot be subjected to excise taxation, even though they have an *office* in the State, and negotiate sales by the exhibition of samples.

Rearick v. *Pennsylvania*, 203 U. S. 507.
Stockard v. *Morgan*, 185 U. S. 27.
Caldwell v. *North Carolina*, 187 U. S. 622.
Crenshaw v. *Arkansas*, 227 U. S. 389.

The principles of the *Pocahontas Fuel* decision logically require that *all kinds* of *management* of interstate commerce are protected from State taxation, and not merely management by sales managers.

The doctrine of the *McCall* and *Norfolk & Western* cases

applies to all uses of a local office *reasonably* and *fairly incident* to its *business*, when that is exclusively interstate in its character.

These incidental uses include the entire *management* of its interstate business, whether by the president, the treasurer or the board of directors. We submit that the *Champion* case should have been decided in favor of the company, for nothing appears in the Record which warrants an inference that anything whatsoever was done at the local office in the way of *business* except what was connected with interstate deliveries or matters *fairly incident* thereto, such as the management thereof, and the receipt and distribution of the revenues therefrom.

The Local Sale of Emergency Repair Parts of Machines Sold Only in the Channels of Interstate Commerce, is FAIRLY INCIDENT to Such Commerce, and should be Protected from State Taxation Equally with the Commerce Itself.

The *Lanston* case, as above shown, should have been decided otherwise upon the ground that the tax must bear some fair and reasonable relation to the value of the local privilege exercised.

The same case also presents the question whether the local sale of emergency repair parts is not *fairly incident* to the sale of the machines themselves made wholly through channels of interstate commerce, and, consequently, whether such incidents are not protected from State taxation equally with the commerce itself.

This company sells a type-setting machine for use largely by newspaper plants.

Its main business is the sale of such machines.

This business, as conducted at its Boston office, was exclusively interstate, no stock of machines being kept there (Rec. 12).

It has no local repair shop, but does have a local stock of emergency duplicate parts to repair breaks (Rec. 12), valued at $1,000. "Any repair parts that are not immediately needed are supplied from Philadelphia" (Rec. 12).

The total repair parts sold from this office throughout New England amounts to $12,000 per annum, at a total profit of $2,400 (Rec. 12).

The amount furnished to customers in Massachusetts is not given, but, assuming it to be one half of the total trade in New England, the result is that the total profit from local or domestic commerce amounts to $1,200. For the privilege of transacting local business, the company is forced to pay an excise of $2,000 per annum.

These figures alone make it plain that the local privilege is not sought for the profits derivable therefrom, and that the tax must be a *direct burden* on the interstate portion of its business, because the local business cannot pay its own way, let alone its proportional part of general corporate expenses and of a fair return on the $10,000,000 capital or the part thereof invested in Massachusetts. It keeps nothing in stock but emergency breakable parts.

The fair inference is that the company submits to this burden from necessity, and that the furnishing of emergency parts is not only *fairly* incident, but is also a *necessary* incident to its interstate commerce, carried on by the same salesmen and instrumentalities at the same place.

If emergency duplicate parts were not kept at hand, a newspaper plant would have to shut down for several days until the broken part could be replaced from Philadelphia.

Naturally, customers will not buy such a machine, other kinds being obtainable, unless emergency parts are here kept for sale, even at a loss to the company from such local business.

If it abandons such a local stock, obviously the amount of its interstate trade must suffer *directly* and *intrinsically*, and not through the mere loss of extra profits to be derived from

local business, or through loss of " economies of management " or " advertising advantages," as suggested by the Court (p. 572).

The Record states that the " keeping of this stock here is an inducement to customers to buy the petitioner's machines" (Rec. 12), that is, tends to increase its interstate commerce. On the other hand, " the abandonment of it would deprive them of that advantage over their competitors " (Rec. 12). From the point of view of prospective customers, it is evident that they *must* have these emergency parts ready at all times for emergency use. It is a *practical necessity* of the interstate business that such parts be kept on hand. The Court below (p. 572) holds that " there is no *necessary* or *inherent* connection " between the interstate commerce and the keeping here of emergency parts. " Because the interstate commerce may not be profitable, except in connection with local business, does not so interlock the two that they are inseparable " (p. 572).

But the question here is not one of *profit*, at all. If, as is fairly inferable, the interstate commerce cannot be conducted at all, or cannot be transacted to a reasonable extent, because of the lack of emergency parts, there is a *practical necessity* for conjoining the two classes of business. There is, we submit, a " necessary or inherent connection " between them, even if that were an important inquiry.

The company is not " free to renounce " the local business, except at a serious loss to its interstate commerce, even if that were the proper test.

The connection between the two is far more " necessary " and " inherent " than existed in the *Western Union* cases (216 U. S. 1, 56), where the only results from abandoning local traffic would be simply the loss of *profits* derivable therefrom.

Here there would be a direct and serious injury to the interstate commerce itself.

In the *Lanston* case we submit that the keeping of emer-

gency parts was *fairly* and *reasonably incident* to its interstate commerce, and, consequently, cannot serve as a warrant or basis for this excise.

In the Automobile Business, the Keeping of a Repair Shop and the Taking in Part Payment and Re-sale of Second Hand Cars, are Matters Fairly Incident to the Sale of New Machines in Interstate Commerce Channels.

Similar considerations apply in the *Locomobile* case (Rec. 13), where it is apparent that the repair business on its own make of cars, and the taking of second-hand cars, in part payment for new cars sold, and the re-sale of the same, are *practically necessary* to the conduct of its *main* business in Massachusetts, which is the sale of machines exclusively in channels of interstate commerce.

See

Banker Brothers v. *Pennsylvania*, 222 U. S. 210.

The Record shows that the abandonment of each of these departments of local business "would seriously impair its sales of new cars" (Rec. 16), that is, would *directly* and seriously burden and injure its interstate commerce, instead of merely causing it to lose the profits derivable from local commerce.

In practically no case can it be said that local and interstate commerce are *absolutely inseparable* or that the former is a *necessary* incident to the latter.

In the *Locomobile* case, we submit that the local business is shown to be *fairly* and *reasonably incident* to the main business in Massachusetts, consisting of sales and deliveries of new machines in the channels of interstate commerce exclusively.

The Small Percentage of Business in the Northwestern Case may Fairly be Considered a Mere "Incident" to Its Main Business of Interstate Commerce.

As to the *Northwestern* case, the small proportion of local business, amounting only to 1% of the whole sales made through the Boston office, may also be considered *fairly incident* to the main business.

But, in any event, the tax bears no fair and reasonable relation to the amount or value of the local business or privilege.

Copper Range Company does No "Business" in Massachusetts.

As to the *Copper Range* Company, it transacts no commerce, either in Massachusetts or elsewhere (218 Mass. 558, 576), being a mere holding company.

The question whether its functions exercised in Massachusetts constitute the doing of *business*, will be considered later.

VII.

Interstate Commerce.

What Constitutes Interstate Commerce? — It Includes Sales of Goods for Delivery from or into Other States, as well as Railroad Transportation.

It was formerly contended in behalf of the Commonwealth that ordinary trading and manufacturing corporations which sell goods in one State for delivery into other States are not engaged in interstate commerce, and that only railroad and transportation companies, or the like, are so engaged.

" The negotiation of *sales* of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce."

Mr. Justice Bradley, *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 497.

Cooper Manufacturing Co. v. *Ferguson*, 113 U. S. 727.

Parsons-Willis Lumber Co. v. *Stuart*, 182 Fed. 779.

" All interstate commerce is not *sales* of goods.

" Importation into one State from another is the indispensable element, the test of interstate commerce; and every *negotiation*, *contract*, *trade* and dealing between citizens of different States which *contemplates* and causes such importation, whether it be of *goods*, persons or information, is a transaction of interstate commerce."

Butler Bros. Shoe Co. v. *U. S. Rubber Co.*, 156 Fed. 1, 17. (Quoted with approval 217 U. S. 91, 107.)

Ware & Leland Co. v. *Mobile Co.*, 209 U. S. 405.

American Express Co. v. *Iowa*, 196 U. S. 133, 143.

Kidd v. *Pearson*, 128 U. S. 1, 20.

Hatch v. *Reardon*, 204 U. S. 152.

Armour Packing Co. v. *Lacy*, 200 U. S. 226.

A.

The " Commerce " Clause Protects from State Taxation All Interstate Sales and Deliveries of Goods, the Business of Making Such Sales, the Place where Conducted, All Means and Instrumentalities of Carrying on Such Business and All Matters Fairly Incident to Such Commerce.

Contrary to the contentions of the Commonwealth, the Massachusetts Court has now definitely settled these propositions:

(1) The protection of the "commerce" clause is not limited to railroad or *quasi*-public corporations, but includes equally trading companies engaged in making sales and deliveries in channels of interstate commerce.

(2) A *place* of business used solely for the purpose of making such sales or deliveries, or otherwise used solely for purposes of interstate commerce, is also protected.

The Court below also holds that the "necessary incidents" to such commerce are also protected, but does not concede our claim that all matters *fairly* and *reasonably incident* to such commerce are equally protected.

> *Marconi Wireless Tel. Co. et al.* v. *Commonwealth*, 218 Mass. 558, 569, 572.

The Court below, however, still clings to its unique theory that the principles of the *Western Union* cases (216 U. S. 1, 56) are limited to *quasi*-public corporations or corporations "for hire," and do not apply to ordinary trading companies engaged in interstate commerce. This ruling is directly contrary to the express statement of this Court in the *Baltic* case:

> "True it is that their products are sold and shipped in interstate commerce, and to that extent they are engaged in the business of carrying on interstate commerce and are entitled to the protection of the Federal Constitution against laws burdening commerce of that character.
>
> "Interstate commerce *of all kinds* is within the protection of the Constitution of the United States."
>
> *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 86.
>
> *Kansas &c Ry. Co.* v. *Botkin* (decided Feb. 21, 1916).

And this necessarily means that the principles of the *Western Union* cases apply equally to trading companies.

B.

"Itinerant Drummer" Cases.

The "drummer cases" represent only one phase of sales in interstate commerce. They have much more extended application than is admitted by the Commonwealth.

They furnish no justification for the theory that although such salesmen are engaged in the business of interstate commerce, only their sales or their business or the goods sold are protected from State taxation.

An *office* used as headquarters for "drummers," or otherwise used for purposes of interstate commerce, is equally protected from State taxation.

A company maintaining such an office cannot lawfully be subjected to an excise for such privilege.

These cases alone decide the *Cheney Brothers* case.

Under the principles of these cases, it is settled that sales of goods for delivery in other States constitute transactions of interstate commerce; that the protection of the "commerce" clause is not confined to *quasi*-public corporations, but is extended equally to trading, manufacturing and mining companies engaged in interstate sales; and that excises, whether in the form of privilege and occupation taxes or of license fees, are unconstitutional, when exacted for the privilege of making, negotiating or superintending interstate sales or contracts of sale, or deliveries thereunder, even though the order is given and title passes within the limits of the taxing State.

C.

The Exact Place where Title Passes, is an Immaterial Factor.

If the order or contract of sale made in this State precedes transportation and delivery from another State, and

contemplates or requires transportation between the States, it constitutes a transaction of interstate commerce, irrespective of the fact that title passes in this State or remains in the seller until delivery here by its agent to the purchaser or until payment of the purchase price here.

Even though *title* to the goods sold may pass in the same State where the contract of sale is made, this is an immaterial inquiry in determining whether the transaction constitutes interstate commerce. The real test is whether the order or contract of sale is given or made in advance of the transportation of the goods from one State to another, and contemplates or requires such transportation. If so, such sale and delivery constitute interstate commerce, irrespective of the exact time or place where title passes.

Dozier v. *Alabama*, 218 U. S. 124.
Rearick v. *Pennsylvania*, 203 U. S. 507, 512.
Savage v. *Jones*, 225 U. S. 501, 520.
American Express Co. v. *Iowa*, 196 U. S. 133.
Emert v. *Missouri*, 156 U. S. 296.
Machine Co. v. *Gage*, 100 U. S. 676.

C.O.D. deliveries, where the goods remain in the hands of the seller or his agent until final delivery to the purchaser, upon payment of the purchase price, and until passage of title in the same State where the order or contract of sale originated, are, nevertheless, interstate commerce transactions, because the goods are transported from one State to another pursuant to previous orders, sales or contracts of sale.

Crenshaw v. *Arkansas*, 227 U. S. 389.
Rogers v. *Arkansas*, 227 U. S. 401.
Banker Bros. v. *Pennsylvania*, 222 U. S. 210.
Dozier v. *Alabama* (*supra*).
Rearick v. *Pennsylvania* (*supra*).
Caldwell v. *North Carolina*, 187 U. S. 622.
Brennan v. *Titusville*, 153 U. S. 289.

C.O.D. deliveries, in such cases, are likewise interstate commerce transactions, where the purchase price is collected, in the State where the order originated, by express companies or carriers.

Brennan v. *Titusville* (*supra*).
Norfolk & Western R'y v. *Sims*, 191 U. S. 441.

Even if a machine ordered in one State from an automobile company in another State is consigned to the company's agent in the former State, and is there delivered to the purchaser upon payment of the final instalment of the purchase price, the transaction, nevertheless, constitutes interstate commerce, irrespective of the fact that the contract of sale, the delivery and the passage of title all take place in a single State.

Banker Bros. v. *Pennsylvania*, 222 U. S. 210.
Crenshaw v. *Arkansas*, 227 U. S. 389.
Rogers v. *Arkansas*, 227 U. S. 401.

These decisions fully settle the interstate character of the transactions in the *Locomobile*, *Lanston* and *Northwestern* cases.

No suggestion is here admissible that the goods have come to *rest* within the borders of the taxing State before the contract of sale is made or the order is given, as in

American Steel & Wire Co. v. *Speed*, 192 U. S. 500.
Bacon v. *Illinois*, 227 U. S. 504.
General Oil Co. v. *Crain*, 209 U. S. 211.
Susquehanna Coal Co. v. *Amboy*, 228 U. S. 665.

Similar transactions constitute interstate commerce even where title does not pass *at all*, as in case of leased machines or conditional sales, like the *Lanston* case.

Vulcan Steam Shovel Co. v. *Flanders*, 205 Fed. 102.

D.

The Office or "Place of Business," Used for Purposes of Interstate Commerce, is also Fully Protected from State Excises, under the "Commerce" Clause, equally with the Business, the Goods Sold and the Agents Negotiating the Sale.

No Means or "Instrumentalities" whatsoever of Interstate Commerce can be Subjected to State Excise Taxation.

Offices or *places of business*, used for purposes of interstate commerce, are exempt from State excise taxation, as well as all other means or *instrumentalities* of interstate commerce.

Norfolk & Western R. R. Co. v. *Pennsylvania*, 136 U. S. 114.
McCall v. *California*, 136 U. S. 104.
Marconi Wireless Tel. Co. v. *Commonwealth*, 218 Mass. 558, 569.

The leading decisions regarding *offices* or *places* of business have been previously considered.

There are numerous other cases where State excises have been declared unconstitutional, when imposed for the privilege of maintaining telegraph offices, commercial offices, agencies and similar places of business, or exacted from the local agents transacting business at such offices.

Western Union Telegraph Co. v. *Kansas*, 216 U. S. 1, and cases cited.
Stockard v. *Morgan*, 185 U. S. 27.
Corson v. *Maryland*, 120 U. S. 502.
Caldwell v. *North Carolina*, 187 U. S. 622.
International Text Book Co. v. *Pigg*, 217 U. S. 91.

VIII.

"NECESSARY EFFECT" AND OPERATION OF AN EXCISE, OR OF THE MEASURE OF AN EXCISE, IS THE ESSENTIAL INQUIRY REGARDLESS OF THE FORM OF THE EXCISE.

THE "NECESSARY EFFECT" AND OPERATION OF THIS TAX, MEASURED BY THE ENTIRE AUTHORIZED CAPITAL STOCK, IS TO BURDEN THE INTERSTATE COMMERCE OF THE COMPANY, BECAUSE THE CAPITAL STOCK REPRESENTS THE WHOLE BUSINESS, BOTH INTERSTATE AND DOMESTIC, AND ALL THE ASSETS EVERYWHERE. AND THIS WAS EXPRESSLY DECIDED IN THE WESTERN UNION CASES TO BE THE "NECESSARY EFFECT" OF THE KANSAS STATUTE IN PRECISELY THE SAME TERMS.

Not Necessary to Show a Direct or Intentional Burden.

It is not necessary to show that a tax *directly* or intentionally *burdens* interstate commerce, if the "necessary operation" of the tax is to burden such commerce.

Western Union Tel. Co. v. *Kansas*, 216 U. S. 1, 27.

"Necessary Operation" of Such an Excise is to Burden the Interstate Portion of the Business, as was Directly Decided in the Western Union Cases, as to the Kansas Statute, in Precisely the Same Terms.

The *Western Union* cases directly decided that the "necessary operation" of an excise, "measured" by the entire capital stock, is to burden the interstate portion of the business, where both interstate and domestic commerce are transacted in conjunction at the *same places* and by the *same instrumentalities.*

Western Union Tel. Co. v. *Kansas*, 216 U. S. 1.
Pullman Co. v. *Kansas*, 216 U. S. 56.
H. K. Mulford Co. v. *Curry*, 163 Cal. 236.
Northern Pacific R'y Co. v. *Gifford*, 136 Pac. 1131.

As was there said (216 U. S. 1, 27):

"If the statute, reasonably interpreted, either directly or by its *necessary operation* burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business."

Court Looks through Mere Forms and Reaches the Real "Operation" of Such an Excise, Regardless of the Declared Intention of the Statute.

The Court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things.

Western Union Tel. Co. v. *Kansas*, 216 U. S. 1.
Flint v. *Stone Tracy Co.*, 220 U. S. 107, 163.
Galveston &c R'y v. *Texas*, 210 U. S. 217, 227.

"The form or mode of imposing the conditions [on foreign corporations] is not nearly so important as their *necessary and practical operation.*"

Sioux Remedy Co. v. *Cope*, 235 U. S. 197, 203.

"In determining whether a tax has such a direct relation to interstate commerce as to be an exercise of power prohibited by the commerce clause, our decision must regard the substance of the exaction — its *operation and effect as enforced* — and cannot depend upon the manner in which the taxing scheme has been characterized."

Mr. Justice Hughes, *Kansas City &c R'y Co.* v. *Botkin* (decided Feb. 21, 1916).

The burden was not *directly* or intentionally imposed on the interstate portion of the business by the Kansas tax, for the tax *professed* to be exacted for the privilege of doing a purely local intrastate business wholly within the limits of Kansas.

The Massachusetts excise, in precisely the same terms, makes the same *profession*, attempting to do by indirection what confessedly cannot be done directly, namely, burden or " fetter " in any way the transaction of interstate commerce.

In the *Western Union* cases, this Court followed its usual practice of " looking through forms and reaching the substance of the thing."

Pursuing this method, the Court found that the declared purpose, to tax only the local privilege, did not represent the *real effect* and *operation* of such an excise, which alone must govern the question as to its constitutionality, whatever may be the declared purpose of the statute.

The Western Union Cases directly Decided that the " Necessary Operation " of the Kansas Excise was to Burden Interstate Commerce. — Massachusetts Excise is in precisely the Same Terms and must, therefore, have the Same " Necessary Operation."

The question there involved, as here, was, what is the " necessary operation " of an excise " measured " by the entire capital stock of a foreign corporation transacting local and interstate commerce, in conjunction, at the *same places* and through the *same instrumentalities?*

As restated by Mr. Justice Harlan, the question there decided was:

> " If a statute, by its *necessary operation*, really and substantially burdens the interstate business of a foreign corporation seeking to do business in a State, or imposes a tax on its property outside of such State, then it is unconstitutional and void, although the State legislature may not have intended to enact an invalid statute."
>
> *Ludwig* v. *Western Union Tel. Co.*, 216 U. S. 146, 162.

That the Court directly decided that this was the " necessary operation " of the Kansas tax, and that, this being the case, it was not necessary to show that it was a " direct burden " on interstate commerce, is shown conclusively by the opinion of Mr. Justice Harlan in the *Western Union* cases and in all subsequent references to these cases.

He stated that the Kansas excise " was, *in effect*, a tax both on the interstate business of that company and on its property outside of Kansas " (216 U. S. 56, 63).

The language of Chief Justice White, in his concurring opinion, does not question that the " necessary operation " of a statute is the proper test, though his reasons are expressed in a different form:

> " The imposition on a corporation which has the right to do interstate commerce business within the State of an unconstitutional burden for the privilege of doing local business, is, in my opinion, the *exact equivalent* of placing a *direct burden* on its interstate commerce business " (*ib.*, pp. 68, 69).

This is far from saying that a " direct burden " on interstate commerce must be shown in case of such an excise.

The proper meaning of the decision has been expressed by Mr. Justice Day thus:

> " This Court held, looking through forms and reaching the substance of the thing, that the tax thus imposed was, *in reality*, a tax upon the right to do interstate business within the State, and an undertaking to tax property beyond the limits of the State; that, whatever the declared purpose, when reasonably interpreted, the *necessary operation and effect* of the act in question was to *burden* interstate commerce, and to tax property beyond the jurisdiction of the State, and it was therefore invalid."
>
> *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 163.

Similarly, the Arkansas excise of the same kind " is, *in*

effect, a direct burden and tax on its interstate business, as well as on its property outside of the State."

Mr. Justice Harlan, *Ludwig* v. *Western Union Tel. Co.*, 216 U. S. 146, 163.

See, also,

Southern R'y Co. v. *Greene*, 216 U. S. 400, 416.
Atchison &c R'y v. *O'Connor*, 223 U. S. 280, 285.
Western Union Tel. Co. v. *Andrews*, 216 U. S. 165.

The language of this Court in no way justifies the views of the Massachusetts Court as to the meaning of the *Western Union* cases. That Court says:

"The principle established by these decisions is that the Court, looking through the form of a statute to its substance, will ascertain whether in truth the impost is a *direct tax* upon interstate commerce, whatever may be the guise under which it is levied, and, applying this rule, statutes under consideration in each of these cases, requiring of all foreign corporations payment of a certain percentage of their entire capital stock, were found to be a *direct burden* upon that portion of the corporate capital engaged in interstate commerce, and hence void."

S. S. White Dental Mfg. Co. v. *Commonwealth*, 212 Mass. 35, 42.

On the contrary, the "necessary operation and effect" of such an excise was to "burden" interstate commerce, in the language of Mr. Justice Day in the *Flint* case (*supra*).

Whether this *necessary effect* arose *directly*, or by indirection, is inconsequential.

It need not be a "direct burden" but, at most, only the "equivalent" of such a burden, in the language of Chief Justice White (*supra*).

The "Necessary Operation" of the Kansas Excise was Held to Result in "Burdening" Interstate Commerce, because the Capital Stock of a Company Represents its Entire Business, Interstate and Domestic, and all its Assets Everywhere.

Why was a *burden* on interstate commerce held to be the "necessary operation and effect" of the Kansas excise? Because, as stated by the Court itself:

> "Such a single fee, *based* as it was *on* all the property, interests and business of the company, within and out of the State, was, *in effect*, a tax both on the interstate business of that company, and on its property outside of Kansas."
>
> *Pullman Co.* v. *Kansas*, 216 U. S. 56, 62, 63.

> "The capital stock of the company *represents*, we repeat, *all its business, property and interests* throughout the United States and foreign countries, and the requirement that the company, engaged in interstate commerce, may continue to do a local business in Arkansas, and escape the heavy penalties prescribed, must pay a given amount (in this case $25,050) *based on* all its capital stock, merely for filing its articles of incorporation with the Secretary of State, is, *in effect*, a *direct burden and tax on its interstate business*, as well as on its property outside of the State."
>
> *Ludwig* v. *Western Union Tel. Co.*, 216 U. S. 146, 163.

If the Capital Stock of the Western Union Company Represents its Entire Business, Interstate and Domestic, the Total Capital Stock of These Corporations Represents the Same Thing.

If the authorized capital stock of the Western Union Telegraph and Pullman companies *represents all their "business, property and interests* throughout the United States

and foreign countries," the authorized capital stock of the present companies must equally well *represent all their business*, both interstate and domestic, and *all their property* everywhere.

Kansas and Massachusetts Excises, in precisely the Same Terms, Cannot "Operate" Differently. — The "Necessary Operation" of the Kansas Excise was to Burden Interstate Commerce, as was directly Held. The "Necessary Operation" of the Massachusetts Excise must be the Same.

So, also, if the "necessary operation" of the Kansas statute was to *burden* interstate commerce, the Massachusetts excise, in precisely the same terms, must have exactly the same "necessary operation" and effect.

The Same Statute must have the Same "Necessary Operation," When Applied to the Capital Stock of Different Corporations, whether They are Quasi-Public or Trading Companies.

Nor can the same statute have a different effect and "necessary operation," when applied to these companies, from what it had with respect to telegraph and *quasi*-public companies.

Kansas Excise Used Capital Stock as a "Measure," just like Massachusetts Statute.

The Kansas excise, moreover, was *measured* or "based on" the authorized capital stock, precisely like the Massachusetts statute.

No suggestion is permissible that the Kansas statute was intended to be a direct tax on interstate capital, property or revenues, while the Massachusetts excise only uses capital

stock as a " measure." No distinction here exists, for the authorized capital stock was expressly treated as a mere *measure* or " basis " of the tax, in the *Western Union* cases. It was " based on " all the property and business of the company, in the language of Mr. Justice Harlan.

Ludwig v. *Western Union Tel. Co.*, 216 U. S. 146, 163.

Western Union Cases Conclusive Here.

Accordingly, as the Kansas statute violated the " commerce " clause, the Massachusetts excise must also violate it, and for the same reason, when applied to companies transacting both classes of commerce, in conjunction, at the *same places* and through the *same instrumentalities*, because no possible distinction can be suggested between the two statutes and their " necessary operation and effect."

The $2,000 Maximum Limit of the Old Massachusetts Tax Cannot Make Any Difference in Its " Necessary Operation and Effect " because these Companies are Not Subject to the Maximum Provision.

The $2,000 maximum provision is immaterial here, because none of these companies is subject to it. As applied to these companies, it is a " fluctuating " tax rising in exact proportion to the increase of interstate capital " representing " its interstate business. The fact that some other company is subject to a maximum provision, cannot alter, in any respect, the " necessary operation and effect " of a statute operating upon these companies precisely in the same manner as the Kansas statute, in exactly the same terms, " operated " upon the companies there involved.

Massachusetts Tax of $2,000 is Actually Heavier and More Onerous than the Kansas Excise.

If mere size of a tax is an important consideration, it is well to point out that the old Massachusetts tax, limited to $2,000, is actually a more burdensome tax than the Kansas excise.

The Massachusetts tax is payable *annually*.

The Kansas excise was a charter fee, payable once for all. The Pullman Company's fee was $14,800. A tax of $2,000 per annum, capitalized at 4%, means an ultimate payment of $50,000, an outrageous charge for the privileges exercised by any of the present companies.

To be sure, the *Western Union* decision directly involved *quasi*-public corporations and the present companies are trading corporations engaged in interstate commerce in Massachusetts. But even the Court below admits that the "commerce" clause protects such trading companies fully as much as telegraph and *quasi*-public corporations.

No Reason Why the Principles of the Western Union Decision should be Confined to Quasi-Public Corporations.

No reason can be suggested why the principles of the *Western Union* decision do not apply equally to *all* classes of interstate commerce companies, or why they should be confined to *quasi*-public corporations.

Principles of Western Union Cases (216 U. S. 1, 56) Not Weakened or Changed by Baltic Decision (231 U. S. 68).

Nor are the principles of the *Western Union* cases at all questioned or weakened by the *Baltic* decision (*Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68).

As stated by Mr. Justice Day, referring to the previous decisions (*ib.*, p. 86):

"A tax has only been invalidated where its *necessary effect* was to *burden* interstate commerce, or to tax property beyond the jurisdiction of the State."

"The conclusion, therefore, that the authorized capital is only used as the *measure* of a tax, in itself lawful, without the *necessary effect* of *burdening* interstate commerce, brings the legislation within the authority of the State" (*ib.*, p. 87).

"Necessary operation" of the Massachusetts Excise on the Baltic Company differed from the "necessary operation" of the same kind of excise on the Western Union Company, simply and solely because the Baltic Company did not transact interstate commerce, in conjunction with domestic business, at the same places and through the same instrumentalities.

The meaning of the *Baltic* decision has already been fully considered. The only reason why the Court held that the "necessary operation" of the Massachusetts excise as applied to the *Baltic* company differed from that of the Kansas tax, was that the former, under the special and peculiar facts of the *Baltic* case, did not "operate on" a company transacting both classes of commerce, in conjunction, at the *same places* and through the *same instrumentalities*, for the corporation was "carrying on a purely local and domestic business *quite separate* from its interstate transactions" (*ib.*, p. 86), which were conducted wholly in New York.

Therefore, the "necessary operation" of the same statute was regarded as different *because of* the two distinct methods of conducting interstate commerce, in the one case in conjunction with local business, and in the Baltic case wholly apart and separated from it.

No other reasonable ground can be suggested for distinguishing the Baltic and Western Union cases, the statutes being the same. — If not fairly distinguishable upon some reasonable ground which can be distinctly

and clearly stated, one case or the other must now be overruled.

If this is not the *vital* ground upon which the *Baltic* facts differed from the *Western Union* case, no other reasonable ground for distinguishing these cases can be suggested, and one or the other decision must now be overruled.

The suggestion that, in the *Baltic* case, " the authorized capital is only a part of the capital of the corporations respectively " (*ib.*, p. 87), would seem to have no real force, because it is apparent that, whether there are surplus assets or not, the total authorized capital stock must *necessarily* in every case represent the whole business, both interstate and domestic, and the entire property and assets everywhere, including *all surplus assets*, if any.

But, in any event, the record of the present cases shows no surplus assets whatsoever.

Several of these companies could, as we claim, show it to be the fact that they possess no surplus assets whatever above the value of their capital stock at par.

The Massachusetts excise is also unconstitutional under the " due process " clause, because its " necessary operation " is to tax property and assets beyond the limits of the taxing State, as was directly held to be the " necessary operation " of the same statute in the Western Union cases.

For the same reasons as those stated in the *Western Union* and other cases (*supra*), the Massachusetts excise also must have precisely the same " necessary operation " as the Kansas statute had under the " due process " clause, in taxing property outside of the limits of the taxing State, and is, therefore, unconstitutional.

The statutes are the *same*.

The authorized capital stock in each case " represents " the *same* thing, namely, the entire assets and property, both beyond and within the limits of the State.

Therefore, the " necessary operation " of the Massachusetts statute, as applied to the present companies, having, so far as shown, no surplus assets, must have precisely the same " necessary operation " as the Kansas excise, " having the *effect* . . . to *reach property represented by* the capital stock of the companies, which was duly paid in and invested in many States, and, therefore, beyond the taxing jurisdiction of Kansas " (*Baltic* opinion, p. 85).

In the *Western Union* case and all the cases following it, the Kansas excise was stated to result in a " tax upon property " beyond the borders of the taxing State, in the " necessary operation and effect " of that excise.

> Mr. Justice Day, *Southern R'y Co.* v. *Greene*, 216 U. S. 400, 416.
>
> Mr. Justice Harlan, *Pullman Co.* v. *Kansas*, 216 U. S. 56, 62, 63.

If the Kansas Tax, in Its " Necessary Operation and Effect," Reached or Taxed Property outside the State, the Massachusetts Statute must necessarily have the Same Effect.

Why does not the Massachusetts excise " reach property " or " tax property " beyond the borders of the State if the Kansas statute, in precisely the same terms, had that effect?

The answer made by the Court (*Baltic* opinion, p. 87), is that the " tax is not void, because imposed upon property beyond the State's jurisdiction, for *the property itself is not taxed.*"

No one claims that the *property* is *directly* taxed, but we submit that the real and " necessary operation " of the statute is to reach and tax property outside of the State, for the property itself *is* taxed quite as much as the Kansas excise, in the same terms, taxed *property*.

At least, the *effect* or *necessary result*, in reaching or *taxing* foreign *property*, must be precisely the same, in either case.

The Kansas Statute Used Capital Stock as a Mere "Measure" just as much as the Massachusetts Statute. —No Distinction Exists in This Respect.

The Court adds another equally inconclusive and invalid reason for distinguishing the *Western Union* cases (*ib.*, p. 87):

> " In so far as it [foreign property] is *represented* in the authorized capital stock, it is used only as a *measure* of taxation, and, as we have seen, such *measure* may be found in property, or in the receipts from property, not in themselves taxable."

Surely, no one can claim that, in the Kansas statute, such " property " was not likewise used as a " measure."

Mr. Justice Harlan expressly states that the Kansas tax was " based on " all the property and business of the company.

> *Ludwig* v. *Western Union Tel. Co.*, 216 U. S. 146, 163.

No suggestion was made in the *Western Union* cases, that the foreign property was itself *directly taxed*, for the Court was obliged to look through the forms and reach the substance, in its conclusion that the *real effect* and *necessary operation* of that excise was to reach and " tax property " beyond the borders of the taxing State.

While it is undoubtedly true that a " measure " of taxation may sometimes properly be found in property not in itself taxable, this concession does not warrant the conclusion, that an *unlawful measure* may be adopted, and that an excise may properly be " based on " the entire authorized capital stock, which " measure " has the " necessary operation and effect " of *burdening* interstate commerce and of reaching and taxing property beyond the borders of the State, as was directly decided in the *Western Union* cases.

> Mr. Justice Day, *Southern R'y Co.* v. *Greene*, 216 U. S. 400, 416.

Under the direct authority of the *Western Union* decision, the Massachusetts excise must have precisely the same "necessary operation and effect" as the Kansas statute, although the statute, upon its face, may profess not to burden interstate commerce, and not to tax property outside of the State.

The Massachusetts excise, accordingly, is unconstitutional and void, because it conflicts with the "due process" clause, as well as the "commerce" clause.

It has always been the law that a tax which, in its "necessary operation and effect," burdens interstate commerce violates the "commerce" clause. This was not a new doctrine first formulated in the Western Union cases.

In some of the earlier cases it was stated that the effect on interstate commerce must appear to be a "direct burden."

But, when examined, these statements will appear to mean the same as the requirement of the *Western Union* decision, to the effect that it is sufficient to show that the "necessary operation" of the tax is to "burden" interstate commerce, and that it is not necessary to show a "direct burden."

A State May Tax Local Property of an Interstate Commerce Corporation.

A State may undoubtedly tax the property of a foreign corporation which is permanently located within its limits, when the ascertainment of the amount of the tax depends, in fact, on the fair value of the property.

Postal Telegraph Co. v. *Adams*, 155 U. S. 688, 696.
Leloup v. *Mobile*, 127 U. S. 640, 649.

An Interstate Commerce Corporation is Subject to Local Regulations Which Affect Interstate Commerce only Incidentally or Remotely.

An interstate commerce corporation is subject to all local regulations which only incidentally or remotely affect its business, but are established for the protection, comfort and convenience of the people, and do not, in any real sense, conflict with the substantial rights of those engaged in interstate commerce, but are referable to the police powers of the State and are to be respected, until Congress covers the subject by legislation.

Cooley v. *Board of Wardens*, 12 How. 299.
Smith v. *Alabama*, 124 U. S. 465.

But the States may Not "Fetter" the Right of Foreign Corporations to Transact Interstate Commerce.

It is well settled that "a State, while possessing power to adopt reasonable measures to promote and protect the health, safety, morals and welfare of its people, even though interstate commerce be *incidentally* or *indirectly* affected, has no power to exclude from its limits foreign corporations or others engaged in interstate commerce, or by the imposition of conditions to *fetter their right* to carry on such commerce, or to subject them in respect to their transactions therein to requirements which are unreasonable or pass beyond the bounds of suitable local protection."

Sioux Remedy Co. v. *Cope*, 235 U. S. 197, 201.
Crutcher v. *Kentucky*, 141 U. S. 47.
Minnesota Rate Cases, 230 U. S. 352, 401, 402, 410.
Adams Express Co. v. *New York*, 232 U. S. 14, 31.

"If it bears upon commerce among the States so *directly* as to amount to a regulation in a *relatively immediate way*, it will not be saved by name or form."

Galveston &c R'y v. *Texas*, 210 U. S. 217, 227.

Earlier Decisions Required a Substantial " Burden " on Interstate Commerce to be Shown, and Not a " Direct Burden."

Regardless of the *Western Union* decision, it is sufficiently clear that an excise operating on the interstate business and revenues of a foreign corporation, in the manner here shown, would have been held, under the earlier authorities, to have constituted a substantial " burden " on interstate commerce, and not merely an indirect or incidental burden.

Crutcher *v.* **Kentucky, 141 U. S. 47.**

In this case an act was held unconstitutional which required an agent of a foreign express company doing business in Kentucky to take out a license, upon payment of small fees ($5 or $10) and filing of a copy of its charter, and various financial statements, no discrimination being made between interstate and local business. The Company was engaged in both classes of commerce.

Mr. Justice Bradley there said:

> " These regulations are clearly a *burden* and restriction upon that [interstate] commerce (p. 59). . . .
>
> " [The decisions] are clear to the effect that neither licenses nor *indirect taxation of any kind*, nor any system of State regulation, can be imposed upon interstate any more than upon foreign commerce " (p. 62).

Gloucester Ferry Co. *v.* **Pennsylvania, 114 U. S. 196.**

In this case a Pennsylvania statute was held unconstitutional which imposed an annual tax on both domestic and foreign corporations rated by the dividends declared and imposed upon the *capital stock of the corporation at a named rate for every dollar of such stock*, so far as concerned interstate commerce corporations.

Although, obviously, the capital stock was used as a "measure" of the excise, this tax was held to be a *burden* on interstate commerce, the Court, through Mr. Justice Field, stating (p. 211):

> "We are clear that a *tax* or other *burden* imposed on the property of either corporation, *because it is used to carry on that commerce* . . . is invalid and void."

Philadelphia Steamship Co. *v.* Pennsylvania, 122 U. S. 326.

Here a Pennsylvania statute was held unconstitutional which imposed a tax upon the "gross receipts" of one of its own corporations which were derived from interstate commerce.

Leloup *v.* Port of Mobile, 127 U. S. 640.

In this case a license tax imposed on a telegraph company, a large part of the business of which consisted of interstate messages, was held unconstitutional.

Mr. Justice Bradley there says (p. 645):

> "Of course, the exaction of a license tax, as a condition of doing any particular business, is a tax on the occupation, and a tax on the occupation of doing a business is surely a tax on the business."

Galveston &c R'y. *v.* Texas, 210 U. S. 217.

Here the Texas statute was held unconstitutional which imposed an annual tax "equal to" one per cent of its "gross receipts" on each railroad lying wholly within the State, such gross receipts including, in part, the receipts from interstate traffic.

Mr. Justice Holmes says (p. 227):

> "The distinction between a tax 'equal to' one per cent and a tax of one per cent of the same, seems to us

nothing, except where the former phrase is an index of an actual attempt to reach the property, and to *let the interstate traffic* and the *receipts* from it *alone*. . . .

" This is merely an effort to reach the *gross receipts*, not even disguised by the name of an occupation tax, and in no way helped by the words ' equal to.' "

Brennan *v.* Titusville, 153 U. S. 289.

Here a license tax on solicitors of orders in behalf of manufacturers outside of the State, was held unconstitutional, the Court saying (p. 303):

" It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only *indirectly* affecting the business, but is a *direct charge* and *burden* upon that business."

See also

Ashley v. *Ryan*, 153 U. S. 436.
Caldwell v. *North Carolina*, 187 U. S. 622.

The Natural or Necessary Effect and Operation of a Tax or a Statute Determines the Question of Its Constitutionality, Irrespective of the Form or Professed Intent of the Legislation.

According to well-settled rules of construction, the question whether a statute is, in any real sense, a regulation of or burden upon commerce must be determined by its " natural and reasonable *effect*," irrespective of its form or language or even its direct intent.

Henderson &c v. *Mayor*, 92 U. S. 259, 268.
Brimmer v. *Rebman*, 138 U. S. 78.

As was said in *Minnesota* v. *Barber* (136 U. S. 313, 319):

" There may be no purpose upon the part of a legislature

to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its *necessary operation*, be destructive of rights granted or secured by the Constitution."

See also,

Walling v. Michigan, 116 U. S. 446, 455.

Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530.

In this case an excise nominally imposed upon the shares of the telegraph company, was held to be, *in effect*, a tax only on the property used in Massachusetts, because *based on* the proportionate value of the company's lines in that State. Its constitutionality was upheld solely because it was *based on* and *measured by* the value of that portion of its capital stock which represented only its property and business inside of the State.

Instances where the "Necessary Operation" of a Tax Differs from its Professed Object.

Many instances are given by Mr. Justice Harlan (216 U. S. 1, 32), where the *necessary operation* of a statute is held to be distinct from its professed object, as, for example, where a fee on the sale of an imported article, or upon the occupation of an importer, was held to be a tax on the *property* imported. (*Brown* v. *Maryland*, 12 Wheat. 419, 444.)

Justice Harlan (*ib.*, p. 32) concluded that, like the numerous analogous cases mentioned, the Kansas statute, "by its *necessary operation*, will accomplish precisely the result that would have been accomplished, had it been made, *in express words*, a condition of doing local business, that the Telegraph Company should submit to taxation upon both its interstate and intrastate business and upon its interstate property everywhere, *as represented by its capital stock*."

This must also be the "necessary operation" of the Massachusetts excise in precisely the same terms.

"Necessary Operation" of the Massachusetts Excise in Substantially Burdening Interstate Commerce, as Shown by the Special Facts in the Present Cases.

But, aside from the "necessary operation and effect" of such an excise, as conclusively determined by the *Western Union* cases, what is the "necessary operation" of the Massachusetts excise, under the special facts here appearing?

Northwestern Case.

As the amount of the excise is measured by its total authorized capital stock, which *represents* its entire business, both interstate and domestic, the *burden* of payment of the tax must fall chiefly on the revenues from interstate business, where, as here, the *Northwestern* company's local business in Massachusetts is only one per cent of the total business transacted there.

Add the interstate business done in all the other States, and we have an almost infinitesimal proportion of local business, as compared with its total business, *represented by its entire capital stock.*

Obviously, the revenues from interstate commerce must pay and be burdened with a large proportion, almost the whole of this tax, even though the local business should yield enough profit to pay the tax.

The local business, in any event, does not pay its *fair proportion.*

As the interstate business and, consequently, the total capital stock, gradually increases in amount, a larger tax is paid *wholly* by the interstate business, if the local business remains stationary.

Increases of Capital Stock Invested Wholly Outside of the State, where the Local Business Remains Stationary, Present Cases which Demonstrate that, under Such an Excise, the Interstate Business is Necessarily Burdened with the whole Additional Tax Caused by an Increase of Capital.

Take, for illustration, one of the new cases now before the Massachusetts Court, involving one of the companies here, the *Locomobile Company*, under the new amended statute. Several years ago it increased its capital stock. The increase was wholly invested in enlarging its Connecticut factory and its interstate business. No increased investment was locally made in Massachusetts. Its local business remained wholly stationary. Some of the present cases, if the facts were shown, would develop similar increases of capital stock, although these facts do not appear in the present record.

In such cases, the additional Massachusetts excise, due wholly to increased capital stock invested elsewhere, is based wholly on increased business, capital and revenues in which Massachusetts has no possible interest.

As the foreign capital and assets and the interstate business of the corporation increase, the Massachusetts excise increases in exact proportion.

The increased tax is based *wholly* and *directly* on increases of assets elsewhere.

The increase in taxes is thus a *direct burden* on its assets and capital elsewhere engaged in interstate commerce.

Crane Co. *v.* Looney, 218 Fed. 260.

In a similar case, the Federal District Court in Texas, sitting with three judges, has recently decided (since the *Baltic* decision) that an excise tax based on capital stock and surplus is unconstitutional upon the ground that the effect of the Texas statute is " to make the privilege of doing a

local business in Texas subject to the condition that it shall first pay to the State a given per cent of all its *capital and surplus*, representing all its property, wherever situated and all its business, intrastate and interstate."

The Court there says:

> "An imposition which is based, whether in whole or in substantial part, on the value of property outside of the State, or on interstate or foreign commerce engaged in, *so that the amount of it grows in exact proportion* to the growth of such property or commerce, is a *burden* on such property or commerce.
>
> "This burden the State cannot impose, either directly or as a condition to the grant of a privilege which it may confer or withhold.
>
> "The statutes in question so obviously impose such a *burden* that it is not permissible to regard them as privilege taxes or excises, the amount of which is determined by *something not having a necessary relation* to the amount or value of things which are not subject to the State's taxing power.
>
> "The exactions being so made that the amount of them cannot be determined without taking into account the amount of property and business which are not subject to State taxation, and being *greater or less, according as such property or business is greater or less*, the *necessary* effect of the enforcement of them is to *burden* such property or business."

The Court held the *Baltic* case to be distinguishable because the tax there was made dependent on the *total authorized capital stock*, which the Court said was different from a tax measured by the entire capital stock and surplus assets. This distinction clearly cannot hold, because the authorized capital stock undoubtedly covers *all surplus assets* as well as the property represented by the *par value* of the stock. But the real ground for objection to a tax of the character of the Massachusetts excise was there forcibly stated. Different from the new Kansas statute, the Massachusetts and

Texas statutes *do* " fluctuate with the volume of interstate business " and the capital used therein.

Kansas &c R'y Co. v. *Botkin* (decided Feb. 21, 1916).

Where Entire Local Business is Insufficient to Pay This Excise, the Burden of Paying It is Necessarily Thrown Directly on the Revenues from Interstate Commerce, because there is No Other Source from which Payment of the Tax can be Obtained.

How can the tax be other than a *direct burden* on interstate commerce in cases where the entire local business is not large enough to pay the tax?

In the *Lanston* case the entire profit from sales of emergency repair parts throughout New England from the Boston office was $2,400 (Rec. 12). Assuming one half of this business to be local Massachusetts business, the total profit from domestic business would be $1,200.

The annual tax is $2,000.

The total revenues from local commerce are insufficient to meet the tax.

There is no other source from which it can be paid, except the revenues from its interstate commerce.

Accordingly, in this case it is plain that the interstate business must be *directly* and heavily *burdened*.

This is the natural result to be expected from an excise tax which pays no attention whatsoever to the question whether the *actual exercise* of the local privilege is relatively large or small, for, under the interpretation of the Court below, the whole tax is payable for the slightest *actual exercise* of the privilege of doing local business, or for the *exercise* of the most trivial or technical local functions, like the holding of " several " directors' meetings in the course of a year.

If this is the natural and ordinary result of such an excise,

its " necessary operation and effect " is to *burden* interstate commerce.

Nor is the *Lanston* an isolated case.

The *Locomobile* and *Northwestern* cases present substantially the same considerations. It makes no difference if the amount of local business, as in the *Locomobile* case, is just large enough to let the tax barely squeeze through, and possibly get paid out of local revenues, through their substantial or complete exhaustion.

It is apparent, even in such a case, that the net revenues from local commerce cannot be sufficiently large, so that they may make their fair contribution to general corporate expenses and a fair return on the capital locally invested in domestic business.

The natural and necessary result is that the deficiency must be made up by the revenues from interstate commerce, which is, accordingly, *directly* and severely burdened. If Massachusetts may get such an unfair return, all other States may tax these corporations in like manner for nominal privileges, and the result will be disastrous to interstate commerce.

It may safely be estimated that more than a majority of the foreign corporations doing business in Massachusetts are paying large excises, because of some comparatively trifling local activity, the privilege of doing which, if charged for at its fair and real value, would be worth a small license fee of perhaps $25 to $50 (instead of $10,000 or more, under the amended statute), but which continues to be exercised by the companies because it is a convenience to their customers, as well as themselves, in connection with their *main* business, which is interstate commerce.

Where the Only Revenue-Producing Business is Interstate Commerce, the Tax is Necessarily Paid by and is a Direct Burden upon the Revenues from Interstate Commerce, because there is No Other Source of Payment.

In some of these cases, the only revenue-producing business transacted anywhere, is interstate commerce.

The *Champion* Company's revenue-producing business consists exclusively of interstate sales and deliveries.

Any tax exacted for the local privilege of holding "several" directors' meetings a year, must be paid out of the revenues from interstate commerce, for there is no other *real business* or source of income. Consequently, in such a case, there is a *direct burden* on interstate commerce, because the revenues therefrom are obliged to suffer the burden of paying the tax, in the absence of any other source of income.

This is the "necessary effect" of such a system, as applied to companies like the *Champion* company.

The natural and inevitable result, in such cases, as well as many others, if not in more than a majority of the cases coming under the Massachusetts tax, is that the revenue from interstate commerce *must* meet the tax, in whole or in part, *because the local functions cannot pay their own way.*

The natural and ordinary results of such an excise system of taxation must be deemed to have been intended.

The result is, that the Massachusetts excise, as applied to these and many other companies, is a mere "device" to reach or touch the *revenues* derived from interstate commerce.

There certainly is no indication here of an attempt to reach the local business exclusively, and "to *let* the interstate traffic and the *receipts* from it *alone.*"

Mr. Justice Holmes, *Galveston &c R'y v. Texas*, 210 U. S. 217, 227.

The Conclusive Effect of the Western Union Decision, under the Kansas Statute in precisely the Same Terms as the Massachusetts Excise, as Applied to the Present Companies, is Not Affected by the Recent Decisions as to the Amended Kansas Statute, establishing a New System of Excise Taxation as to Foreign Corporations.

The Kansas excise statute as to foreign corporations was amended in 1913, after the *Western Union* decision, and put upon a proper basis, the tax now being based on the "*proportion* of the issued capital stock of the company *represented by* its property and business in Kansas," and the amount of the fee being graduated according to the amount of the issued capital stock " used in Kansas." The maximum annual fee is fixed at $2,500, when the amount of stock *so used* exceeds $5,000,000.

This represents the kind of statute which Massachusetts should be compelled to adopt, instead of the former basis for excise taxation in Kansas, which was condemned in the *Western Union* decision.

Lusk et al. *v.* Botkin (Decided Feb. 21, 1916).

The only question here decided was that the new foreign corporation excise of Kansas was not unconstitutional upon the ground that foreign corporations were discriminated against, because of the fact that the same statute, in different terms, was unconstitutional as to domestic corporations, for the Court simultaneously (*Kansas City &c R'y Co.* v. *Botkin, infra*) declared the law to be constitutional as to domestic corporations.

Kansas City &c R'y Co. *v.* Botkin (Decided Feb. 21, 1916).

In this case the Court declared that the Kansas excise on domestic corporations was constitutional, because it was a " franchise tax on the privilege granted by the State of being a corporation."

It levied a fixed amount of tax graduated according to the amount of paid-up capital, and was limited to a maximum fee of $2,500 for corporations having a paid-up capital of $5,000,000 or more.

Mr. Justice Hughes there says:

> " It [the excise on domestic corporations] does not *fluctuate* with the volume of interstate business."

The Massachusetts excise as well as the earlier Kansas foreign corporation excise *does*, on the contrary, *fluctuate* in exact accordance with the increase of interstate capital and assets and the increase in the " volume of interstate business."

The Recent Kansas Decisions do Not Overrule the Western Union Decision.—Nor Do They properly State the Real Ground for the Baltic Decision.

The only importance that the above Kansas decisions have here is that, for the first time, an attempt is made to clear up the doubts of Courts and the bar as to the *real* ground upon which the *Baltic* decision rests, and as to how it is differentiated from the *Western Union* cases.

Mr. Justice Hughes there says:

> " It was because the [Baltic] tax, although measured by authorized capital stock, could not, *in view of its limitations*, be regarded as imposing a direct burden upon interstate commerce, that the tax was upheld."

We submit that, so far as the *Baltic* opinion shows, the maximum limit of $2,000 did not cut the slightest figure in the reasons given by the Court for that decision.

The only reference to the maximum, is the mere statement (231 U. S. 68, 87):

> " Further, the Massachusetts statute limits the tax to a maximum of $2,000."

Obviously, this narrative statement in *one line*, in the course of a *ten-page* opinion, cannot be regarded as the *real* reason for that elaborate decision.

As above shown, it rests, and can only rest, upon the ground that the *Baltic* company's interstate and domestic businesses were not carried on in the *same places*, and by the *same instrumentalities*, because its interstate commerce was transacted exclusively in New York and wholly separated and apart from its domestic activities in Massachusetts.

The maximum limit was wholly immaterial there, as it is here, for the conclusive reason that the *Baltic* company and these companies do not come under the maximum provision at all (paying $2,000 or less), for they are subjected to a tax which " fluctuates " in exact accordance with increases in their interstate assets and business, " represented by " their increased capital stock.

The Massachusetts excise, in so far as these companies are, in any way, concerned with it, is in precisely the same terms as the Kansas statute condemned in the *Western Union* decision, the maximum limit being a factor wholly immaterial to these companies.

The fact that some other companies do or may come under the maximum provision, cannot be a material factor in the consideration of the *actual* tax to which the present companies are subjected.

It cannot be the case that the objections to the original Kansas statute, as set forth in the *Western Union* decision, would have been remedied simply by introducing the maximum limit of $2,500 now appearing in the new Kansas statute. The amended Kansas statute introduced the *vital* element of making the tax depend on the *proportionate* amount of capital stock *used in domestic commerce*.

These companies conduct both classes of commerce *in conjunction* and at the *same places*, and through the *same instrumentalities*, thus differing from the *Baltic* company.

As no other intelligible distinction can be stated, we come within the direct authority of the *Western Union* decision.

If the Massachusetts excise, in precisely the same terms, is still to be sustained, as applied to the present companies, we submit that it should frankly be stated that the *Western Union* cases have been overruled by the *Baltic* decision, which is a result never contemplated.

IX.

"EQUAL PROTECTION OF THE LAWS" CLAUSE. — THE MASSACHUSETTS STATUTE CREATES ARBITRARY CLASSIFICATION AND UNLAWFUL DISCRIMINATION AGAINST FOREIGN CORPORATIONS AND IN FAVOR OF DOMESTIC CORPORATIONS. — THIS EXCISE, AS APPLIED TO THE WHITE COMPANY, COMES DIRECTLY WITHIN THE AUTHORITY OF *Southern Railway Co.* v. *Greene* (216 U. S. 400), AND, CONSEQUENTLY, IS UNCONSTITUTIONAL, BECAUSE IT DENIES "EQUAL PROTECTION."

The "equal protection of the laws" clause in the Fourteenth Amendment is involved in the *White Company* case.

We submit that this case comes within the direct authority of *Southern Railway Co.* v. *Greene* (216 U. S. 400); and that the Massachusetts excise, as applied to the *White Company*, denies the "equal protection," in the same manner as the similar statute involved in the *Southern Railway* case.

Whatever power a State may have to determine the terms of admission of foreign corporations not already within its borders, it cannot subject a foreign corporation which is already in the State in compliance with its laws, and has there acquired property of a fixed and "permanent" nature, to a new or additional excise for the privilege of doing local business, when at the same time no similar additional taxation is imposed upon domestic corporations engaged in precisely the same line of business. Such an excise is unconstitutional and void, because it denies the "equal protection

of the laws" guaranteed by the Fourteenth Amendment (*Southern R'y Co.* v. *Greene*, 216 U. S. 400).

Southern R'y. Co. *v.* Greene, 216 U. S. 400.

In this case the Alabama statute was held to be unconstitutional, which imposed a new and increased tax upon foreign corporations, for the privilege of doing domestic business within the State. The railroad company, prior to the passage of the new tax law, had been duly admitted to do business in Alabama, and had there constructed lines of railroad and invested considerable sums of money in improvements under the existing system of taxation. The new tax was not made applicable to domestic corporations owning similar property and carrying on the same kind of business.

Mr. Justice Day there says (p. 412):

"The equal protection of the laws means subjection to equal laws applying alike to all in the same situation. . . .

"While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification (p. 417). . . .

"It would be a fanciful distinction to say that there is any real difference in the burden imposed, because the one is taxed for the privilege of a foreign corporation to do business in the State, and other for the right to be a corporation.

"The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the State, exactly the same business as the domestic corporation is

permitted to do by a tax upon its privilege, amounting to only a few hundred dollars.

"We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws" (pp. 417, 418).

This reasoning is equally applicable to the *White Company*, under the Massachusetts excise. The *White Company* had been duly admitted to do business in Massachusetts, and had paid the foreign corporation tax prescribed by the earlier system of taxation (Sts. 1903, Chap. 437, Sec. 75), amounting to "one hundredth of one per cent of the par value of its authorized capital."

Under this system, it was allowed to deduct from its excise "the amount of taxes upon property paid by it to any city or town in the Commonwealth during the preceding year."

The Company for many years had maintained a place of business in Boston, having been duly admitted to do business in this State prior to 1903, and had paid, under the law of 1903, an excise tax at the rate of one one-hundredth of one per cent. In 1907 (Sts. 1907, Chap. 578; now Sec. 56 of Sts. 1909, Chap. 490, Part III), the rate of taxation was doubled.

By the same statute the previously existing right of foreign corporations to deduct local property taxes was abolished, thereby affecting all corporations which then had property subject to local taxation (Sts. 1903, Chap. 437, Sec. 71, 75), but this right was still retained as to domestic corporations (*ibid.*).

No similar changes have been made at the same time or since, with reference to domestic corporations having the same kind of property and engaged in the same line of business as the *White Company*.

The taxation of domestic corporations is now under the provisions of Sts. 1909, Chap. 490, Part III, Secs. 41, 43. By these statutes and by the tax system of 1903 local property taxes may still be deducted from the amount of their excise or franchise tax.

"After 1903 (when St. 1903, c. 437, §75, was in force) and before 1909" (218 Mass. 558, 579) this company acquired land at 341 Newbury street in Boston, and built thereon a seven-story building made of brick, concrete and steel, with wide floors, no posts and very heavy steel construction, specially adapted for use as a garage. This building had two corner elevators, and below the first floor were installed three 500-gallon gasoline tanks, and on the first floor was a turn-table. The cost of this investment approximated $175,000 (Rec. 19).

The petitioner further acquired, after 1903 and prior to 1909, at a cost of $100,000, buildings and about 7,000 square feet of land at 320 Newbury street in Boston, which was then used as a boarding stable, and was altered and remodeled by the company for a service station at a cost of $22,000. The partitions were removed, the floors were strengthened by heavy steel concrete construction, the building was made fireproof, and gasoline tanks and elevators were placed in the building, in order to make it peculiarly adapted for the use of automobiles.

The petitioner has not used or occupied this piece of property for several years past, and has had the property for sale or lease, but has not yet sold or leased it. The petitioner, at the date of payment of this tax, owned both of these pieces of property (Rec. 19).

The *S. S. White Dental Manufacturing Company* (*Baltic* cases, 231 U. S. 68) failed to come within the authority of the *Greene* case simply because, as the Court states (p. 88):

"The conditions existing in the *Southern Railway Co.* v. *Greene* case are not presented here. . . .

"We do not find in this situation an acquisition of

permanent property, such as was shown in the Greene case."

This was a perfectly correct finding, because the only investment which that company had made in Massachusetts consisted of a slight amount of leasehold fixtures put in under a short lease.

The Court below, however, holds that the principles of the *Greene* decision apply only to railroad companies or the like (218 Mass. 558, 580).

We submit that this view is entirely erroneous.

No suggestion of such a limitation is made in the opinion in the *Baltic Cases.*

It is only necessary to show that a " permanent " property investment was made under or pursuant to the preceding tax system.

The Court below, without quite venturing to go so far as to assert that the *Greene* decision was absolutely confined to railroads, proceeds (p. 580) to attach a strained and highly refined signification to the simple words, " permanent property," used by this Court in the *Greene* and *Baltic* opinions:

> " Permanent property " [as used in these opinions] " we interpret to mean at least a kind of property, ownership of which is inherently necessary for the establishment of the business, which must abide in the same ownership, and which cannot in the nature of things be sold in the general market so as to yield a fair return for the cost, less its normal depreciation " (*ib.*, p. 580).

The Court adds that " there is nothing to indicate that the purchase of real estate and the construction of a building were indispensable features of its initial admission to do business here. It is common knowledge that business like that of the petitioner often is conducted on leased property " (*ib.*, p. 580).

The same might have been said as to railroads.

It is an equally common practice to have " car leases," covering railroad cars.

But of what possible legal bearing is the nature of title as bearing upon the *permanency* of the investment?

Frequently very valuable investments and improvements are made in leased properties.

Are leasehold investments running for a long term to be wholly disregarded, and is " equal protection " to be extended only to real estate owned in fee?

Can it be that the Court intended only to protect real estate, and not to include personal property, although *permanently* invested? Or not to include personal property located on leased property?

But these inquiries require no decision in the present case because we have here absolute ownership in fee of two large and valuable buildings, the total investment therein being $275,000. One was "specially adapted for use as a garage " (Rec. 19).

Not only was it specially constructed, but it had some very peculiar features, quite different from buildings adapted for ordinary real estate uses.

Below the first floor were three 500-gallon gasoline tanks. On the first floor was a turn-table.

It is obvious that, if converted to other uses, these peculiar features would have to be eliminated at great expense.

The fact unduly insisted on by the Court below that the automobile business is a " widespread business " and the assumption made by the Court that " such establishments are frequent subjects for sale and lease," do not seem to militate at all against the obvious fact that these buildings were of peculiar construction, particularly adapted for their special uses and not readily convertible to other uses, except at considerable expense.

Although its land may be " readily salable," it requires no evidence to show that a *building* so peculiar in construction could not ordinarily be sold for other uses at its original

cost, less depreciation, because the purchaser must, at least, take into account the necessary cost of altering the building over from one devoted to special and very peculiar uses to one adapted for ordinary mercantile, manufacturing or other ordinary uses of real estate. Railroad stations can be sold for other uses.

Garages can also be sold for ordinary uses, but the sale necessarily involves an expense for conversion to such uses fully equal to that involved in the sale of a railroad station.

The Court erroneously held that, in order to show a " permanent " property investment, and thus come within the authority of the *Greene* case, it must appear that it is " property of a nature irretrievably devoted to a limited and monopolistic use " and " not readily available either for other valuable uses or to other persons ready to devote it to the same uses at prices fairly equivalent, subject to the general vicissitudes of business conditions, to the original investment " (p. 580).

It would be difficult to find these elaborate requirements in the simple language of the *Baltic* opinion, that an acquisition of " permanent property " must be shown.

Unless the principles of the *Greene* case are to be confined to railroads, " equal protection of the laws " has been denied by this statute whereby the tax has been doubled and the privilege of deducting local taxes on property has been repealed, whereas no similar changes have been made with respect to domestic corporations engaged in precisely the same business, thereby discriminating against foreign corporations and imposing onerous new taxes on them, while similar domestic corporations are favored and allowed to escape any form of new taxation.

No claim is made that any constitutional limitation upon the power of the States requires " identical taxes " in all cases on domestic and foreign corporations. But it is claimed that the preceding tax system of 1903, based on the

principle of taxing according to the mere grant of a privilege, without regard to the extent of *actual exercise* of the privilege, already imposed sufficiently onerous taxes on foreign corporations. If, as here, a foreign corporation entered the State and made a " permanent " property investment under or on the faith of the preceding tax system, the taxes could not then be doubled and new and onerous provisions imposed upon foreign corporations, without making corresponding (not necessarily " identical ") exactions upon domestic corporations engaged in precisely the same business.

This is the principle of the *Greene* decision.

The only possible way to save the constitutionality of the statute, is to hold that the *Greene* case only applies to railroad or similar companies. This view was fully urged by the Commonwealth before this Court, but no suggestion appears in either the *Baltic* or the *Southern Railway* decisions warranting the argument that the doctrine is limited to railroad companies.

The doctrine is general in its application. No reason can be suggested why it should not apply to all classes of foreign corporations.

What we here claim, under the *Greene* decision, is that no kind of foreign corporations can constitutionally be taxed by a " discriminating method not employed as to domestic corporations of the same kind, carrying on a precisely similar business," provided that such foreign corporations have previously entered the State under or upon the faith of a pre-existing system of taxation, and have acquired therein a " large amount of permanent and valuable property " prior to the passage of the excise tax complained of, whereby new and onerous additional taxes are imposed on foreign corporations, whereas no similar changes are then made as to domestic corporations engaged in the same line of business.

By imposing this very much more onerous excise on this company, in addition to its property taxes and its excises

under the statute of 1903 previously paid by it, this company was denied " equal protection " by a new excise discriminating against it and in favor of domestic corporations of the same type.

The practical result of the new excise, so far as this company is concerned, is as follows:

Under the new excise imposed by the statute of 1909, this petitioner pays one-fiftieth of one per cent on the par value of its authorized capital stock, amounting to $600 annually.

Previously, under the tax system of 1903, this company was assessed for one one-hundredth of one per cent, or $300, less the amount of local property taxes paid by it.

Local taxes on property valued at $275,000 (averaging about $17 per thousand in Boston) would amount to $4,675 per annum. Consequently, under the preceding tax system, this company was liable to no taxation, by way of an excise tax.

In 1909, the privilege of deducting property taxes having been repealed, this company's excise tax is raised from absolutely nothing to $600 per annum.

The discriminatory method of taxation against foreign corporations, adopted by the Statute of 1909, consists:

(1) In doubling the amount of the excise previously in force under the Statute of 1903;

(2) In repealing the right, previously enjoyed by foreign corporations, of deducting their local property taxes from their excise taxes, whereas at the same time no similar changes were made with respect to domestic corporations of a similar type, which still retain the right to deduct their local taxes from their franchise or excise taxes.

X.

MASSACHUSETTS TAX IS UNCONSTITUTIONAL, BECAUSE IT DENIES "EQUAL PROTECTION OF THE LAWS" TO THE SMALLER CORPORATIONS, AND DISCRIMINATES IN FAVOR OF THE LARGER ONES, WHICH ARE MUCH MORE ABLE TO BEAR THE BURDENS OF TAXATION. — THE STATUTE ARBITRARILY AND CAPRICIOUSLY CLASSIFIES FOREIGN CORPORATIONS HAVING LESS THAN $10,000,000, AND THOSE HAVING IN EXCESS OF THAT AMOUNT, WITHOUT ANY REASONABLE BASIS FOR DISTINCTION. — THE CLASSIFICATION IS PALPABLY ARBITRARY AND PURE FAVORITISM, BEING BASED SOLELY ON MERE SIZE AND WEALTH, AND THE RICHER CORPORATIONS BEING TOTALLY EXEMPTED FROM TAXATION ON THEIR CAPITAL IN EXCESS OF $10,000,000.

The original Massachusetts statute, like the amended one, draws the line arbitrarily at a $10,000,000 capital.

Any other figure might have been adopted, with equal reason or lack of reason.

Upon the excess above that amount, the original statute of 1909 totally exempts the larger and wealthier corporations from taxation.

This Excise Creates an Arbitrary Discrimination in Favor of the Larger and Richer Corporations Based solely on their Size or Wealth.

The amended statute of 1914 taxes the excess at one half of the rate which the smaller and poorer corporations, under $10,000,000 capital, are obliged to pay.

It is plain that this discrimination, in favor of the larger and richer corporations, reverses the universal rule of legislation in this country, by declaring that they shall be taxed at a lower rate than the smaller and poorer corporations, or

that they shall go " scot-free " as to such excess, under the original law.

It is no answer to say that the lower rate applies only to the excess.

For the obvious result is that the *average* rate on the *whole* capital is much lower in the case of the larger corporations, not far from one half of the rate applied to the smaller corporations.

Under the original Act, a corporation having $10,000,000 capital pays precisely the same tax as the corporation with $100,000,000 or $500,000,000 capital.

No Tangible Reason, except Pure Favoritism, can be Suggested for such an Arbitrary Classification.

No reason whatever can be suggested for placing the dividing line at $10,000,000, except pure favoritism to the larger corporations, which are more able to stand the burdens of taxation.

It might equally have been fixed at $100,000, or $50,000,000.

It is palpably arbitrary classification, based solely on size and wealth, and, in one case, totally exempting the richer corporations, and, under the amended statute, taxing them at about one half of the rate at which the poorer corporations are taxable.

Differs Wholly from Exemptions of the Poorer Classes, under Income or Inheritance Taxes. — Here, the Richer Corporations are totally Exempted above $10,000,000.

This case presents no question similar to those involved in reasonable exemptions from taxation under Income or Inheritance tax laws, based on inability to stand the burden of taxation.

Here, on the contrary, the richer and larger corporations

either are totally exempted above a certain amount, or are subjected to a lower rate of taxation than the poorer and smaller corporations, which are, accordingly, taxed more onerously than other corporations which are better able to stand the burden.

No plausible reason can be suggested why a corporation with a $9,000,000 capital should pay at the rate of one fiftieth of one per cent, and a corporation with a $11,000,000 or a $500,000,000 capital should pay at one half that rate on the excess above $10,000,000, thus making the *average* rate on the *whole* capital of the largest corporations, with $100,000,000 to $500,000,000 capital, very close to one half the rate applicable to the smaller corporations, with a capital under $10,000,000.

While Reasonable Classification is Permissible, all within the Same Class, and Subject to Like Conditions, must be Treated Alike.

It is well settled, under the " equal protection " clause, that " reasonable classification " is permissible, for purposes of excise taxation, but it is equally settled that all within the same class, and subject to like conditions, must be treated alike.

Chicago Dock Co. v. *Fraley*, 228 U. S. 680, 681.
Southwestern Oil Co. v. *Texas*, 217 U. S. 114, 121, 127.
Selover, Bates & Co. v. *Walsh*, 226 U. S. 112.

The Class is here Composed of all Foreign Corporations. — All are Not Treated Alike.

Here the class is composed of *all* foreign corporations.

They are subjected to this excise.

Being within the same class, *all* such corporations must be treated alike, unless some *reasonable* basis can be suggested

for a sub-classification into foreign corporations above and below a $10,000,000 capital.

Classification must Rest on Some Reasonable and Sufficient Basis of Distinction.

Classification, for purposes of taxation, must rest on some "reasonable and sufficient basis of distinction."

Ohio Tax Cases, 232 U. S. 576, 590.
Brown-Foreman Co. v. *Kentucky*, 217 U. S. 563, 572.
Lindsey v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 79.
Toyota v. *Hawaii*, 226 U. S. 184, 187.
Magoun v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 293.
Bradley v. *Richmond*, 227 U. S. 477, 484.
Southwestern Oil Co. v. *Texas*, 217 U. S. 114, 121.
Schmidinger v. *Chicago*, 226 U. S. 578.

Classification must be Based upon "Some Real and Substantial Relation" to the Objects of the Legislation.

"While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some *real and substantial distinction, bearing a reasonable and just relation* to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made, without any substantial basis."

Southern Railway Co. v. *Greene*, 216 U. S. 400, 417.
Gulf, Colorado & Santa Fé R'y v. *Ellis*, 165 U. S. 150, 155.
German Alliance Insurance Co. v. *Hale*, 219 U. S. 307, 318.

Kidd, Dater Co. v. *Musselman Grocer Co.*, 217 U. S. 461, 473.

Quong Wing v. *Kirkendall*, 223 U. S. 59, 64, 65.

Connelly v. *Union Sewer Pipe Co.*, 184 U. S. 540, 559.

Arbitrary Selection is Not Classification.

"But arbitrary selection can never be justified by calling it classification."

Gulf, Colorado & Santa Fé R'y v. *Ellis*, 165 U. S. 150, 159.

Subject to these qualifications, undoubtedly the Legislature has a wide discretion, especially in taxation, which should not be abridged by the Courts.

General Rules as to Excise Taxation.—The Fourteenth Amendment does Not Compel the States to Adopt an "Iron Rule of Equal Taxation."—These General Rules, however, Afford No Sanction to the Arbitrary Favoritism to the Larger and Richer Corporations here Shown.

"In levying excise taxes, the most ample authority has been recognized from the beginning to select some and omit other possible subjects of taxation, to select one calling and omit another, to tax one class of property and to forbear to tax another."

Flint v. *Stone Tracy Co.*, 220 U. S. 107, 158, 159, 160.

"The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as

churches, libraries and the property of charitable institutions.

"It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate, and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them.

"All such regulations, and those of like character, so long as they proceed within *reasonable limits* and *general usage*, are within the discretion of the State legislature, or the people of the State in framing their Constitution. But *clear* and *hostile discriminations* against particular persons and classes, especially such as are of an *unusual character, unknown to the practice* of our governments, might be obnoxious to the constitutional prohibition.

"We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation."

Justice Bradley, *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237.

Southwestern Oil Co. v. *Texas*, 217 U. S. 114, 121.

Beers v. *Glynn*, 211 U. S. 477.

Hatch v. *Reardon*, 204 U. S. 152.

Armour Packing Co. v. *Lacy*, 200 U. S. 226.

Savannah Thunderbolt &c Railway v. *Savannah*, 198 U. S. 392.

Cook v. *Marshall County*, 196 U. S. 261.

Home Insurance Co. v. *New York*, 134 U. S. 594.

American Sugar Refining Co. v. *Louisiana*, 179 U. S. 89.

A Classification is [Unconstitutional if] "there is No Fair Reason for the Law that would Not Require, with Equal Force, Its Extension to Others Whom It Leaves Untouched."

A classification is unconstitutional, if "there is no fair reason for the law that would not require, with equal force, its extension to others whom it leaves untouched."

Barrett v. *Indiana*, 229 U. S. 26, 29, 30.
Watson v. *Maryland*, 218 U. S. 173, 179.
Williams v. *Arkansas*, 217 U. S. 79, 90.
Missouri, Kansas & Texas R'y Co. v. *May*, 194 U. S. 267, 269.
International Harvester Co. v. *Missouri*, 234 U. S. 199, 213.

" It is competent for a legislature to determine upon what differences a distinction may be made, for the purpose of statutory classification, between objects otherwise having resemblances. Such power, of course, cannot be *arbitrarily* exercised. The distinction made must have *reasonable basis*.

Mr. Justice McKenna, *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 215.
Clark v. *Kansas City*, 176 U. S. 114.
Gundling v. *Chicago*, 177 U. S. 183.
Petit v. *Minnesota*, 177 U. S. 164.
Williams v. *Fears*, 179 U. S. 270.
Griffith v. *Connecticut*, 218 U. S. 563.
Chicago, R. I. & Pac. R'y Co. v. *Arkansas*, 219 U. S. 453, 466.
Fifth Ave. Coach Co. v. *New York*, 221 U. S. 467.
Murphy v. *California*, 225 U. S. 623.
Rosenthal v. *New York*, 226 U. S. 260, 269, 270.
Denver v. *New York Trust Co.*, 229 U. S. 123, 143.
Patsone v. *Pennsylvania*, 232 U. S. 138, 144.
Missouri, Kansas & Texas R'y v. *Cade*, 233 U. S. 642.
Keokee Coke Co. v. *Tayler*, 234 U. S. 224.

" The equal protection of the laws is a pledge of the protection of equal laws " to all under like circumstances.

German Alliance Ins. Co. v. *Hale*, 219 U. S. 307, 318.
Yick Wo v. *Hopkins*, 118 U. S. 356, 367.
Barbier v. *Connolly*, 113 U. S. 27.
Soon Hing v. *Crowley*, 113 U. S. 703.

Decisions of Controlling Importance Here, and Holding State Laws to be Palpably Arbitrary Classification and, therefore, in Violation of "Equal Protection of the Laws."

We submit that there is no decision of this Court which goes to the extent of upholding such palpably arbitrary selection, discrimination and classification as appears in the Massachusetts excise statutes, totally exempting capital above $10,000,000, under the original statute, and now taxing it at approximately one half the rate which the smaller corporations pay.

On the contrary, classifications have been held to be unconstitutional which were no more arbitrary than the present classification.

Gulf, Colorado & Santa Fé R'y *v.* Ellis, 165 U. S. 150.

In this case, the Texas statute was held to be unconstitutional, under the "equal protection" clause, which provided that any person having a claim not exceeding fifty dollars against a railroad company, for stock killed or injured, damages, overcharges, etc., might present it for payment, by filing it with a station agent and, if not paid within thirty days, and the claimant should finally establish his claim in court, as filed, in addition to costs, he should be entitled to recover from the railroad a reasonable attorney's fee, not exceeding ten dollars.

The ground for the decision was that railroad companies cannot be thus singled out from all other classes of corporations and individuals and compelled to pay attorney's fees to successful plaintiffs, while the plaintiffs, if unsuccessful, are not subjected to payment of such fees.

Justice Brewer there says:

"They do not stand equal before the law. They do not receive its equal protection" (p. 153). Classification cannot be made arbitrarily. "The State may not say that all

white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men *possessed of a certain wealth.*"

"These are distinctions which do not furnish any proper basis for the attempted classification." (p. 155).

Missouri, Kansas & Texas R'y *v.* **Cade, 233 U. S. 642.**

A quite different statute was here upheld, which did not single out railroads, but allowed small attorney's fees to plaintiffs on claims, not exceeding two hundred dollars, against *all* persons and corporations.

Mr. Justice Pitney says:

"It applies only to certain kinds of claims; but these cover a wide range and do not appear to have been grouped together for the purpose of *bearing against any class or classes of citizens or corporations.* Unless something of this sort did appear, we should not be justified in holding the act to be repugnant to the Fourteenth Amendment" (p. 649).

Cotting *v.* **Kansas City Stockyards Co., 183 U. S. 79.**

In this case the Kansas statute was held to deny "equal protection," which defined public stockyards as those which, on the average, received each day one hundred head of cattle or three hundred head of hogs or sheep, and which regulated the duties and charges of such yards, because it appeared that the law affected only the Kansas City Stockyards Company, and not any other corporations engaged in like business in Kansas.

Mr. Justice Brewer there says:

"If once the door is opened to the affirmance of the proposition that a State may regulate one who *does much*

business, while not regulating another who does the same but *less business*, then all significance in the guarantee of the equal protection of the laws is lost. . . .

"This statute is not simply legislation which in its indirect results affects different individuals or corporations differently; . . . but is a positive and direct discrimination between persons engaged in the same class of business and based simply upon the *quantity of business* which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would" (p. 112).

Connolly *v.* **Union Sewer Pipe Co., 184 U. S. 540.**

This case held that the Illinois Trust Act denied "equal protection" and was unconstitutional, which forbade combinations of capital, skill, etc., because it exempted combinations of owners of "agricultural products or live stock, while in the hands of the producer or raiser."

This exemption was held to create unlawful classification based on no reasonable distinction.

Mr. Justice Harlan says:

"In prescribing regulations for the conduct of trade it cannot divide those engaged in trade into classes and make criminals of one class, if they do certain forbidden things, while allowing another and *favored* class engaged in the same domestic trade to do the same things with impunity. . . .

"Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates.

"We must not be understood by what has been said as conceding that the question of a denial of the equal protection of the laws can never arise under the taxing statutes of a State. On the contrary, the power to tax is so far limited that it cannot be used to impair or destroy rights that are given or secured by the supreme law of the land" (pp. 563).

Southern R. R. Company *v.* **Greene, 216 U. S. 400.**

In this tax case, is shown an example of what is regarded as an arbitrary classification between domestic and foreign corporations, which was held to rest on no reasonable basis when they were engaged in the same line of business.

Flint *v.* **Stone Tracy Co., 220 U. S. 107.**

By the *Flint* decision the principles of *Southern R'y Co.* v. *Greene* were not, in any way, weakened. That decision was not questioned.

Mr. Justice Day remarks:

> " It is insisted, in some of the briefs assailing the validity of this tax, that these cases have been modified by *Southern Railway Co.* v. *Greene* (216 U. S. 400).
>
> " In that case the foreign corporation was doing business under the sanction of the State laws no less than the local corporation; it had acquired its property under sanction of those laws; it had paid all direct and indirect taxes levied against it, and there was no practical distinction between it and a State corporation doing the same business in the same way " (p. 161).

Smith *v.* **Texas, 233 U. S. 630.**

This is an important case, as indicating what amounts to *arbitrary classification*. The Texas statute was here held to deny " equal protection " which prohibited any person from acting as a conductor on a railroad train, unless for two years previously he had worked as a brakeman or conductor on a freight train, and prescribing no other qualifications, because it was held to result in excluding the whole body of the public from the right to secure such employment, although competent, if they did not possess the prescribed qualifications.

Mr. Justice Lamar there says:

" None of the cases sustains the proposition that, under the power to secure the public safety, a *privileged class* can be created and be then given a monopoly of the right to work in a special or favored position. Such a statute would shut the door, without a hearing, upon many persons and classes of persons who are competent to serve and would deprive them of the liberty to work in a calling they were qualified to fill, with safety to the public and benefit to themselves " (p. 638).

Graduated Inheritance and Income Tax Cases Not Conclusive, because They Rest on the Principle that Those More Able to Pay may reasonably be Called on to Bear Heavier Burdens of Taxation than Those Less Wealthy, and that the Poorer Individuals may be Totally Exempted. — Here, the Reverse Principle is Adopted by Massachusetts, to the Effect that the Richer Corporations may be Totally Exempted on Their Excess Riches, or may be Favored by Requiring Them to Pay at a Lower Rate than the Smaller Corporations. — Such a Classification, Based solely on Wealth and Size, Rests on No Reasonable Basis for Distinction, and is Pure Favoritism and palpably Arbitrary Classification.

The decisions which are claimed to be against our position, are those in which progressive or gradated excise taxes on inheritances and on incomes, or " super-taxes " on the larger amounts, have been sustained.

Magoun v. *Illinois Trust & Savings Bank*, 170 U. S. 283.

Brushaber v. *Union Pacific R. R. Co.* (decided Jan. 24, 1916).

Magoun *v.* Illinois &c Savings Bank, 170 U. S. 283.

In this case, the inheritance tax law of Illinois was held to rest on a reasonable basis for classification which taxed legacies to those not relatives at progressive rates, namely,

three per cent up to $10,000, four per cent between $10,000 and $20,000, five per cent between $20,000 and $50,000, and six per cent over $50,000.

Mr. Justice McKenna there says (pp. 293, 294):

> " In some circumstances it may not tax A, more than B, but if A be of a different trade or profession than B, it may. . . . In other words, the State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion. *It is not without limitation, of course.*"

Knowlton *v.* **Moore, 178 U. S. 41.**

In this case the "equal protection" clause was neither involved nor discussed.

The Federal Inheritance tax, at progressive rates, was there held not to conflict with the " uniformity " of excises required by the Federal Constitution, because only *geographical uniformity* is required.

Flint *v.* **Stone Tracy Co., 220 U. S. 107.**

This case also involved only the Federal powers of taxation and presented no question as to the " equal protection " guaranteed by the Fourteenth Amendment against State laws.

Brushaber *v.* **Union Pacific R. R. Co. (Decided Jan. 24, 1916).**

This case involved the " super-tax " and progressive rates of taxation, under the Federal Income Tax.

No question was discussed or decided under the " equal protection " clause in the Fourteenth Amendment.

The Historical Reasons there Advanced have the Opposite Significance Here. — All Income Taxes have Progressed "Upward." — The Massachusetts Excise Progresses "Downward." — Here, the Richer the Corporation, the Less the Tax which It Pays.

A leading reason given for the decision in the *Brushaber* case was thus stated:

> "But the proposition [against the validity of the tax] disregards the fact that in the very early history of the Government a progressive tax was imposed by Congress, and that such authority was exerted in some, if not all, of the various income taxes enacted prior to 1894, to which we have previously adverted."

This statement shows how absolutely different is the principle of legislation adopted in the Massachusetts Excise.

The "progressive tax" referred to, and all similar tax systems, so far as known, have progressed *upward*, according to the greater wealth or income.

The present tax progresses *downward*.

Under the Massachusetts Excise, the poorer the corporation, the larger is the rate of the tax.

If sufficiently large, the wealthy corporation is completely exempted from further taxation, under the original Massachusetts statute, and taxed at approximately one-half the rate applied to the smaller corporations, under the amended statute.

Exemption of the poor or those in moderate circumstances has frequently been proposed and sustained, as reasonable classification, in inheritance and income tax legislation.

But the exemption of the wealthy, or those having, as here, $10,000,000 capital, is certainly a novelty in legislation. Such favoritism has never been proposed anywhere in this country, much less enacted into law, except in Massachusetts.

Certainly such an exemption has never been adjudicated upon in this Court.

Exemption of the Rich is Tax Legislation of an "Unusual Character" and "Unknown to the Practice of Our Governments.— It also Creates "Clear and Hostile Discriminations against Particular Persons and Classes," Here, the Smaller and Poorer Corporations.

Does an exemption of the rich rest upon any reasonable basis, and can it be supported as a classification which rests upon "a *reasonable and just relation* to the act in respect of which the classification is proposed"?

> *German Alliance Ins. Co.* v. *Hale*, 219 U. S. 307, 318.
>
> *Gulf, Colorado & S. F. R'y* v. *Ellis*, 165 U. S. 150, 165.
>
> *Kidd, Dater & Co.* v. *Musselman Grocer Co.*, 217 U. S. 461, 472.

It obviously comes within the class of discriminations of an "unusual character" and "unknown to the practice of our Governments."

> Mr. Justice Bradley, *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237.

It also creates "clear and hostile discriminations against particular persons and classes" (Mr. Justice Bradley, *ibid.*), the smaller corporations, having less than $10,000,000 capital, being obliged, under the amended statute, to pay about twice the rate imposed on the larger corporations, and the latter being totally exempted from taxation on the excess, under the original statute.

Classification Based solely on Mere Size or Wealth, is Purely Arbitrary and Capricious, Resting upon No Proper and Reasonable Basis, where the Law Taxes the Poor and Exempts the Rich.

In some cases the *size* of the corporation, or the amount of its deposits or receipts, may be the index of the evil aimed at

by legislation, as in *Engel* v. *O'Malley* (219 U. S. 128), where the protection of small loans was the real object of the legislation, which exempted average deposits above $500.

Mr. Justice Holmes there says:

> " It is true, no doubt, that, where size is not an index to an admitted evil, the *law cannot discriminate between the great and small.* But in this case size is an index " (p. 138).

So, also, the exemption of large steam laundries was held not to be arbitrary classification, because small hand laundries were made taxable, the *size* being the index of the evil aimed at.

Mr. Justice Lamar, however, in his dissenting opinion, says:

> " It taxes some and exempts others engaged in identically the same business.
>
> " It does not graduate the license, so that those doing a large volume of business pay more than those doing less. On the contrary, it *exempts the large business* and taxes the small. . . . A discrimination founded on the personal attributes of those engaged in the same occupation, and not on the value or the amount of the business, is arbitrary."
>
> *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 64, 65.

But here, the mere *size* or capitalization of the companies is a *palpably arbitrary* basis for distinction.

No reason can be suggested why the wealthier and larger corporations should pay less than the smaller and poorer ones, or should be totally exempted on their capital or wealth above $10,000,000, as the original Massachusetts statute provides.

We submit that both statutes create palpably arbitrary classification, resting upon no reasonable basis for distinction. They bear no " just and reasonable relation " to the object of the legislation.

They, therefore, deny "equal protection of the laws" and are unconstitutional.

Nor can it be successfully urged that the original statute and that of 1914 are distinct statutes, and that the latter is not an amendment to the earlier statute.

Together they form a single scheme of legislation, like any amended statute.

Nor can it be shown that the statute of 1914 intended to impose a "super-tax" on capital above $10,000,000, such as was upheld in the *Brushaber* case.

By a "super-tax" is meant that property or income of a certain amount is subjected to a tax *above* the rate of taxation imposed on a smaller amount of property or income.

This is just the reverse of what the Massachusetts excise attempts to accomplish. Here, the richer the corporation, the less is the rate of taxation.

The Massachusetts statute of 1914 might more properly be termed a "sub-tax," providing a rate for the richer corporation *under* that imposed on the smaller corporation.

XI.

THE MISCELLANEOUS FUNCTIONS EXERCISED IN THE STATE BY THESE COMPANIES DO NOT CONSTITUTE "BUSINESS," NOR IS THE PLACE WHERE THEY ARE CARRIED ON AN "USUAL PLACE OF BUSINESS," AS REQUIRED BY THE MASSACHUSETTS STATUTE.

The holding of directors' meetings, the collection and deposit of funds derived from interstate sales, the management and direction of interstate commerce and deliveries, whether by the treasurer, the president, or the directors, the maintenance of offices as headquarters for interstate salesmen, keeping up corporate organization, correspondence, book-keeping, deposits in banks, keeping of records,

management by mail of property located in other States, sending funds to other States, voting upon stock held in other foreign corporations and all the other special functions and activities shown in the Record (aside from interstate sales and deliveries), are the *ordinary* and usual *incidents* to the interstate commerce of the several companies, as has already been shown, assuming their revenue-producing or real *business* in Massachusetts to have been interstate commerce exclusively.

In any event, these special functions and activities, although carried on in Massachusetts, do not constitute the transaction of *business* in that State.

Consequently, a place used for such functions and activities cannot constitute an " usual place of business " within that State.

Especially is this true if such special functions are merely occasional, intermittent or exceptional, as, for example, one stockholders' meeting yearly, or " several " directors' meetings during the year, as in the *Copper Range* and *Champion* cases.

Proper Meaning of " Business," under the Foreign Corporation Laws of Various States.

Many of the States, by statute, using the same language, have prohibited foreign corporations from doing or carrying on " business " within the State, unless they have previously complied with certain conditions.

Various decisions have been rendered as to the proper meaning of such language. Thus, in *Bradley* v. *Wauhegan & Washington Mining Co.* (113 Ill. App. 600), the Illinois statute provided that foreign corporations " doing business " in the State should be subject to the same restrictions and liabilities as domestic corporations.

The Court held that the opening of an office in Illinois and placing a safe and some office furniture therein, for

the convenience and use of the secretary or treasurer, where he issued certificates of stock and kept books, and the holding of frequent directors' meetings there, did not amount to "doing business" in that State, when the corporation's *real business* was that of mining in the State of Washington.

See, also, as to holding directors' meetings,

Honeyman v. *Colorado Fuel & Iron Co.*, 113 Fed. 96.
Kilgore v. *Smith*, 122 Pa. St. 48.

A Corporation which has an Office in Massachusetts, from which Its Officers Give some Directions for the Management of the Business for which It is Chartered, all of which is Conducted Elsewhere, is Not Transacting "Business" in that State.

In *People* v. *Equitable Trust Co.* (96 N. Y. 387), the Court discussed the meaning of "doing business" as follows:

> "Does it mean occasional or *incidental* corporate business, or continuous business substantially through the year? Does a corporation that keeps an office in this State merely for the record and transfer of its stock, while it does the *business* for which it was chartered elsewhere, do its corporate business within this State, within the meaning of the statute?
>
> "Does a corporation which has an office in this State, from which its officers give some directions for the management of its corporate business, all of which is done elsewhere, carry on its corporate business in this State, any more than an individual carries on his business in this State who is engaged in the business of building a railroad in another State, over which he exercises some control by correspondence from his home here?"

These queries were answered in the negative.

Holding Directors' Meetings, Declaration and Payment of Dividends, and Other Activities "Merely Incidental" to the Regular Business of the Company where Its Mining and Selling and other Chartered Business is Carried On Elsewhere, Do Not Constitute "Business," or a "Regular Place of Business."

In *People* v. *Horn Silver Mining Co.* (105 N. Y. 76) the defendant was a silver mining corporation, with a mine in the West. The silver bullion was all sent to New York State and sold there.

The Court said:

> "We cannot construe the words 'doing business in this State' to mean the whole business of the corporation within this State; and while we are not prepared to hold that an *occasional* business transaction — that keeping an office where *meetings of the directors are held*, transfer books kept, *dividends declared and paid*, and *other business* merely *incidental* to the *regular business* of the corporation is done — would bring a corporation within this act, yet when, as in this case, all these things are done, and, in addition thereto, a substantial part of the *regular business* of the corporation is carried on here, then we are unable to say that the corporation is not brought within the act, as one 'doing business in this State.'"

So, merely voting or acting as a stockholder, selling stock, leasing property, or purchasing a lease, is not *doing business.*

First Nat'l Bank v. *Seeper*, 121 Mo. App. 688.
Toledo Traction, etc., Co. v. *Smith*, 204 Fed. 643.
United, etc., Co. v. *Rambose*, 231 Mo. 508.
Ferkel v. *Columba Clay Works*, 192 Fed. 119.
Com'th v. *Standard Oil Co.*, 101 Pa. St. 119.

So, also, the receipt and distribution of dividends is not "business" under the Federal Corporation Excise law, in case of a leased company, although this is the only activity of the corporation.

McCoach v. *Minehill R'y Co.*, 228 U. S. 57.

Collecting a debt, and taking a mortgage to secure it, is not *doing business.*

Ichenhauser Co. v. *Landrum's Assignee*, 155 S. W. Rep. 938.

Beale on Foreign Corporations, §207, says:

"When the business is consummated outside the State, even though a part of the transaction takes place within the State, the corporation does not do business in the State. Thus, where a foreign corporation solicits orders in the State by commercial travelers, the orders being transmitted to the corporation at its domicile and then filled, the sale is made and the *business* is therefore done at the domicile of the corporation. The foreign corporation in such a case is not doing business in the State."

See

Holder v. *Aultman*, 168 U. S. 81.

In *Advance Lumber Co.* v. *Moore* (148 S. W. Rep. 212), the plaintiff was an Ohio corporation and had an office in Tennessee. It kept some money in a Memphis bank, and had fixtures in its office. It bought lumber in Georgia, Minnesota and Arkansas, and the lumber was shipped directly from those States to purchasers in other States.

No lumber was kept in Tennessee. The company advertised that it had a Memphis office, and at the time of the convention notified lumber men to drop in. The company did little buying of lumber in Tennessee, except on one or two occasions. The Court said:

"The *business* of this company was the buying and selling of lumber. It did neither in Tennessee *as a business*, but only kept an agent here for convenience to look after its purchasing business in adjacent States."

The Court held that it was not *doing business* in the State.

In *Am. Contractor Pub. Co.* v. *Michael Nocenti Co.* (139 N. Y. Supp. 853), the plaintiff published a newspaper in

Illinois and had an office in New York for the purpose of collecting news and soliciting contracts for advertisements and trade reports. *Held*, that it was not *doing business* in New York State.

See also

Seigel etc. Co. v. *Haston*, 75 Pac. 1028 (Kan.).

"Isolated" or "Occasional" Activities, like "Several" Directors' Meetings during the Year, Quarterly Payments of Dividends, and the Like, Do Not Constitute the Transaction of "Business," within the Meaning of the Massachusetts Statute.—Nor is the Office Used for Such Purposes a "Usual Place of Business," especially when, as in the Champion Case, the "Real Business" there Transacted is the Conduct of Interstate Deliveries, or even the Management of a Mine in Michigan (even if the Record Allowed such an Inference, which It Does Not).

So, also, *isolated* or *occasional* transactions by a foreign corporation do not constitute the carrying on of *business*, within the meaning of the statutory provisions.

Cooper Mfg. Co. v. *Ferguson*, 113 U. S. 727.

Advertising Number Co. v. *Moore*, 148 S. W. Rep. 212 (Tenn.).

International Text Book Co. v. *Pigg*, 217 U. S. 91, 104, 105.

In *Cody Motors Co.* v. *Warren Motor Car Co.* (196 Fed. Rep. 254), it was held that the leasing of space at an automobile show, where an automobile chassis was exhibited, and where the principal officers of the company were present for several days, conferring and consulting with different persons, including sales agents, was not *doing business* in the State.

Keeping and Exhibiting of "Samples," as in the Cheney Brothers Case, Do Not Constitute the Transaction of "Business."

In *People* v. *Roberts* (50 N. Y. Supp. 355), a foreign corporation carried on the business of soliciting orders through agents in New York, the goods being shipped from its factory in Massachusetts to the purchaser direct. The corporation leased an office in New York in which it kept *samples*, about $4,000 in value, and had a bank account, in which the average balance was $3,470. The Court held that the corporation was not *doing business* in New York, and could not be taxed.

Taking of Orders, Subject to Approval of the Home Office, is Not the Transaction of "Business," as in the Cheney, Lanston and Locomobile Cases.

In *Penn Colliers Co.* v. *McKeever* (87 N. Y. Supp. 869), the plaintiff was a foreign corporation engaged in mining and selling coal. It had an annual lease of an office in New York City, in its own name. It had telephone service. It kept its name upon the door. Its stationery showed that the company maintained an office there, and that one Olcott was the manager.

Olcott was sales agent, on commission, with no authority to close contracts. He took orders, subject to approval of the home office in Philadelphia. The coal was ordinarily shipped from without the State to buyers. A cargo of coal had been sold to a party in New York, who rejected it, and the coal, being in New York, was then resold to the defendant, who refused to pay.

The Court held that the plaintiff was not *doing business* in the State, within the meaning of the statute as to foreign corporations. All orders for goods sold by the *Cheney*, *Lanston* and *Locomobile* Companies were taken subject

to the approval of the home office outside of Massachusetts (Rec. 12, 13, 14).

In *Vulcan Steam Shovel Co.* v. *Flanders* (205 Fed. 102), the plaintiff, a foreign corporation, leased a steam shovel to a resident of Michigan, and, on forfeiture of the lease, the plaintiff's sales manager showed the shovel to the defendant and thereafter a contract of sale was made by correspondence between the defendant and the plaintiff's office in Ohio. Under the terms of the contract, the plaintiff moved the shovel to another point in Michigan and furnished an agent to install and test it and to replace defective parts, and then delivered it in Michigan to the defendant. It was also the practice of the plaintiff to send traveling salesmen through Michigan, who forwarded orders to Ohio for approval.

The Court held that all these transactions of the corporation in Michigan, including the sale after forfeiture of the lease, were interstate commerce, and no certificate was necessary to be filed in the State.

The Court said (p. 104):

> "The original shipment of the shovel into this state being interstate commerce, and the lease having been forfeited, the plaintiff had a right to sell it to the defendant here in Michigan, and by so doing was not *doing business* in this State."

This case supports the claim of the *Locomobile Co.* that it had a right, as an incident to interstate commerce, to resell used cars accepted as a part of the consideration received in interstate sales of its new machines.

In *Rock Island Plow Co.* v. *Peterson* (93 Minn. 356), the plaintiff made a contract with a warehouse company of Minneapolis, by which the latter received goods and parts manufactured by the plaintiff, such goods to be packed and bundled by the warehouse company for reshipment.

No goods were shipped to warehouses until orders were received from Minneapolis customers.

It was held that this did not constitute the doing of *business* in Minneapolis, in violation of the foreign corporation statute, as it was interstate commerce.

In *Brookford Mills* v. *Baldwin* (139 N. Y. Supp. 195), the plaintiff's mill was in North Carolina and it had no office in New York.

It consigned its goods to a commission merchant in New York, with authority to sell the goods, receive the proceeds and remit. The commission merchant made advances to the plaintiff on goods consigned, guaranteed sales and made sales in its name.

The commission merchant received an order and sent it to the plaintiff for confirmation. The plaintiff confirmed the sale and commenced to manufacture the goods called for by the order, but the defendant refused to furnish shipping directions.

It was held that the plaintiff was not *doing business* in the State.

Solicition of orders by an agent is not " doing business " on the part of the company, although the agent may be doing " business."

Putney Shoe Co. v. *Edwards*, 60 Superior Court (Penn.), 339.

Badische Lederwerke v. *Capitelli*, 155 N. Y. S. 651 (New York Superior Court).

Occasional or intermittent transactions do not constitute the doing of " business."

Commercial Bank v. *Sherman*, 28 Oregon, 573.

Barre Live Stock Co. v. *Range Valley Cattle Co.*, 16 Utah, 59.

Weiser Land Co. v. *Bohrer*, 152 Pac. Rep. 869.

SUMMARY OF CLAIMS IN BEHALF OF PLAINTIFFS IN ERROR.

We submit that the several decrees should be reversed, and decrees ordered that the several petitioners recover the taxes claimed by them respectively, in accordance with the terms of the Report (Rec. 4), that " if any of my rulings applicable to that cause was incorrect, such decree is to be entered as the correct rulings, and whatever rulings should have been made in the place of the incorrect rulings, may require."

We submit that the requests for rulings referred to in the Specification of Errors (*supra*) should have been granted, and that error was committed in refusing them, for the following main reasons, as above argued:

1. The Massachusetts excise violates the " commerce " clause.

2. In the *Western Union* decision the Kansas excise was directly held to have the " necessary operation and effect " of *burdening* the interstate portion of the company's business, because the entire capital stock " represents " its whole business, both interstate and domestic, and all its assets everywhere.

Consequently, an excise, although merely " measured " by the entire capital stock, has the " necessary operation and effect " of *burdening every part* of the business " represented " by the capital stock, including its interstate commerce.

3. If the Kansas excise had the " necessary operation and effect " of *burdening* interstate commerce, the Massachusetts statute, in *precisely the same terms* (except the maximum provision of $2,000 in the original statute, but now repealed), must have exactly the *same necessary operation and effect.*

Moreover, if the entire authorized capital stock of Kansas

corporations " represents " their whole business, both interstate and domestic, the entire authorized capital stock of Massachusetts companies must " represent " exactly the same things.

4. The maximum provision of $2,000 had no conceivable bearing on the decision of the Baltic case:

(*a*) Because the companies there involved were not, in any way, subjected to the maximum tax.

It is inconceivable that the question as to the constitutionality of the tax to which they were *actually* subjected, could, in the slightest degree, be affected or controlled by the fact that some other company or companies not before the Court might be subject to a larger, fixed and " unfluctuating " tax of $2,000, whereas, on the contrary, the taxes of the companies before the Court " fluctuated " exactly in accordance with the amount of their authorized capital stock.

In other words, if their interstate business and assets, and the capital stock required therefor, and " represented " thereby, should increase, while their Massachusetts local business remained stationary, the excise was automatically increased in exact proportion to the increase of the capital stock " representing " increases in interstate business and assets, thereby showing, in such cases (which are not isolated, but in the usual and ordinary course of business), that the increased tax burden was directly due to and based on increases of interstate business and capital.

(*b*) It is unreasonable and incredible to suppose that this solitary reference to the maximum in the *Baltic* opinion *in a single line:* — " Further, the Massachusetts statute limits the tax to a maximum of $2,000 " (231 U. S. 68, 87) — can by any possibility be regarded as more than a narrative statement of an inconsequential fact. It is inconceivable that this casual statement represents the *real ground* for that *ten-page* opinion.

5. The real reason for differentiating the *Baltic* from the

Western Union Cases, was that the *Baltic* company's interstate commerce was conducted exclusively in New York, and was wholly separated from its Massachusetts activities (which did not constitute *commerce* at all), and was not transacted at the *same places* and by the *same instrumentalities* as the domestic functions, or commerce, if any.

This was the reason actually stated at length in the opinion.

No other reasonable ground for distinction can possibly be stated between the Massachusetts and Kansas statutes, which are in precisely the same terms, except as to the maximum provision.

This ground, apparently, did not prevent the Chief Justice and Justices Van Devanter and Pitney from dissenting, in the belief that the Massachusetts excise was unconstitutional, even when applied to the special and peculiar facts of the *Baltic* case.

6. It will not be suggested that the *Western Union* decision, which has over and over again been approved by this Court, was overruled by the *Baltic* decision.

7. Even if the *Western Union* decision had never been rendered, numerous previous decisions would require the Court to hold in the present cases:

(*a*) That this Court always looks through *forms* and attempts to " reach the substance of things."

(*b*) That, although, by the *form* of this excise, capital stock is used as a " measure," it is the duty of the Court to look through the *form*, and ascertain whether the " necessary operation and effect " of using such a " measure " result in " burdening " the interstate commerce portion of the company's business.

If it does so result from the actual or " necessary effect " of using such a " measure," the measure is unlawful, and *form* will not save it.

(*c*) The entire authorized capital stock of a company " represents " its whole business, both interstate and domestic, and all its assets everywhere.

Therefore, a tax based on, or " measured by," its entire capital stock, *necessarily affects* and *burdens every part* of the business and assets " represented " by the authorized capital stock, *including its interstate commerce.*

8. Applied to the present facts, it is apparent that the " necessary operation and effect " of this excise is to *burden* and even *directly burden* the *receipts* derived from interstate commerce, where the revenue-producing *business*, consisting of interstate commerce, is exclusively transacted outside of Massachusetts, as in the *Champion Copper*, *Cheney Brothers* and *Copper Range* cases, or where no sufficient revenue is derived from domestic business to enable it to pay its own way, as in the *Lanston*, *Locomobile* and *Northwestern* cases.

9. Applied to any case (and these cases are many, in practice, including some of the companies before the Court, when the full facts have been shown) where the authorized capital stock is increased and the increase is invested wholly outside of the State in developing interstate business, and the local business and investment remain stationary, the " necessary effect " of the Massachusetts excise (which increases automatically, in accordance with the mere increase of capital stock without regard to where or how it is invested), is to *burden* the interstate commerce, for the increase of tax, in such cases, is wholly due to and based on the increase of interstate business and assets " represented " by the increased capital stock.

10. The recent decisions under the new Kansas statute (*Kansas &c Co.* v. *Botkin* and *Lusk et al.* v. *Botkin*) have no application here, the present cases being absolutely controlled by the *Western Union* decision, unless that decision is to be overruled.

11. The Massachusetts excise also violates the " due process " clause, because the Kansas statute, in precisely the same terms, was held to have the " necessary operation and effect " of taxing its assets everywhere, including property beyond the limits of the taxing State, because its

entire capital stock " represents " its assets and property everywhere, both within and without the State.

This proposition was also directly decided in the *Western Union Cases*, which are controlling here.

12. Under the " commerce " clause, the petitioners were entitled to the ruling requested (4th Ass't. Errors — Rec. 50), to the effect that " it must appear that the amount of local business and the value of the privilege bear some fair and reasonable relation to the amount of the tax imposed for the privilege "; otherwise, the tax is unconstitutional.

13. The petitioners were also entitled to have a ruling made, as was requested and refused (5th Ass't. Errors — Rec. 50), to the effect that the tax is unconstitutional, if, as applied to the petitioners, it is " unduly great, having reference to the real value of the local business and the property used therein," or if the tax is " so disproportioned to the volume and profits of the local business and to the value of the privilege taxed that it should be regarded as a mere device to reach the interstate portion of the company's commerce, property and profits."

14. The petitioners were entitled to a ruling to the effect that the " reality and substantiality " of the local or domestic business " must be determined by taking into account, among other factors, the percentage of the company's local business, as compared with its interstate commerce transacted " in Massachusetts (7th Ass't. Errors — Rec. 51).

15. The petitioners were entitled to a ruling to the effect that those local activities or functions which are *fairly incident* to interstate commerce are protected by the " commerce " clause, equally with the commerce itself, and the Court below was in error in ruling that such " incidents " must be *necessary* to and *absolutely inseparable* from interstate commerce, in order to be protected by the " commerce " clause (9th Ass't. Errors — Rec. 51).

16. Each and all of the miscellaneous functions and activities here relied on by the Commonwealth constitute

matters *fairly incident* to interstate commerce, and cannot be used as the basis or excuse for the excise imposed on the several companies which are shown to be carrying on in Massachusetts no business other than interstate commerce or to be transacting elsewhere commerce of an interstate character, which is managed from its Massachusetts office (10th, 12th and 13th Ass'ts. Errors — Rec. 52).

These local functions or activities, which are mere " incidents " to interstate commerce, include the following:

(*a*) Management of interstate deliveries, where the company's sales are exclusively interstate in character, and a treasurer's office is maintained for the purpose of managing or supervising such deliveries, and of handling the revenues derived from interstate commerce, as in the *Champion Copper* case;

(*b*) Management of interstate sales, deliveries and the revenues derived therefrom, when the company's business consists wholly of interstate sales, whether such management is exercised by the treasurer, president or board of directors, as in the *Champion Copper* case.

This covers also all the *incidents* of such management, *where the sole revenues are derived from interstate commerce,* including:

(1) Depositing funds derived from interstate commerce in local banks;

(2) Declaring and distributing dividends out of the revenues from interstate commerce;

(3) Holding directors' meetings for the purpose of declaring such dividends;

(4) The ordinary book-keeping incident to a treasurer's office which is concerned with the receipt and handling of funds exclusively derived from interstate commerce;

(5) The ordinary clerical work in connection with such an office;

(6) Correspondence in connection therewith;

(7) Keeping of records of sales and deliveries in interstate commerce.

The above are all the activities in Massachusetts shown in the *Champion* case (Rec. 20–23), except that it may be claimed, but without basis of fact, that the *Champion* company's directors use its Boston office for the purpose of managing its mine and mining operations in Michigan.

The Record shows (Rec. 23) that " no votes are considered or passed by the directors which exercise management, control or direction over the mine or mining operations in Michigan, which, in fact, are left exclusively under the charge of the general manager, resident in Michigan."

It is not even true that the " entire corporate potentiality " dwells in the Boston office, because of the fact that its executive officers have their offices there, for, under the by-laws, the president has no power of management or control over the Michigan mine (Rec. 21), such power having been expressly delegated by the directors to the general manager in Michigan, exclusively (Rec. 22).

The " potentiality," of course, must rest with the stockholders at the home of the corporation in Michigan.

Only " several " directors' meetings per year are held (Rec. 22).

(8) Holding one stockholders' meeting per year (*Copper Range* Company).

This is merely an occasional and intermittent activity, and does not constitute an " usual place of business " for this purpose.

(9) Keeping up corporate organization, as in the *Copper Range* case.

(10) Holding shares of stock in foreign corporations, and receiving and disbursing dividends derived therefrom, and voting on the stock, or ownership of mineral lands in Michigan.

These activities (in the *Copper Range* case) are not " incident " to interstate commerce, for, being a holding company, it transacts no commerce of any kind.

These are, however, incidents of ownership in *foreign*

properties, in which Massachusetts has no interest or concern.

(11) Keeping and exhibiting samples at an office used exclusively for the purpose of negotiating sales of goods in interstate commerce as in the *Cheney Brothers* case.

17. All the local activities and functions above referred to, if not " mere incidents " to interstate commerce, are the *means* and *instrumentalities* of such commerce, and protected by the " commerce " clause, equally with the commerce itself.

18. The local activities and functions mentioned do not constitute the transaction of " business," in the sense of the Massachusetts statute. Nor is the place where they are carried on an " usual place of business," where the real revenue-producing " business," authorized to be done by its charter, is conducted wholly outside of Massachusetts.

19. The Massachusetts excise of 1909, as applied to the *White Company*, denies " equal protection " to this company, which had duly entered the State and made large investments in " permanent property," under and on the faith of the preceding tax system of 1903.

By the Acts of 1907 and 1909 the rate charged by the Act of 1903 was doubled, as to foreign corporations, and their statutory right to deduct from their excise the amount of their local property taxes was repealed, without, at the same time, imposing any similar increases in taxation on domestic corporations transacting precisely the same kind of business.

Southern R'y Co. v. *Greene* (216 U. S. 400) is here conclusive, holding that such an increase in taxation unlawfully discriminates against such a foreign corporation, and is unconstitutional, because it denies " equal protection of the laws."

20. The original Massachusetts excise of 1909, as applied to all these companies, denies " equal protection," in that it arbitrarily fixes the line at $10,000,000 capital, above which limit the larger and richer corporations are totally exempted from such taxation.

They are thus favored.

The smaller and poorer corporations, those least able to bear the burdens of taxation, are thus discriminated against.

Such classification is unreasonable and palpably arbitrary, being founded upon no reasonable basis for distinction.

A classification based upon mere size or wealth, whereby the richer corporations are totally exempted from further taxation, is palpably arbitrary and capricious, reversing, as it does, the universal historical principle of Income and Inheritance excise taxation, to the effect that the poorer classes may be taxed more lightly or totally exempted.

Here, the richer corporations are exempted *solely because* of their size and wealth.

The same objections apply equally to the amended statute of 1914.

We respectfully submit that the several decrees should be reversed, and decrees ordered to be entered for all the petitioners (and if not all, for some of them), for the return of the taxes severally claimed by them, together with interest and costs, as claimed in their several petitions.

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THE COMMONWEALTH OF MASSACHUSETTS

[redacted]

Error to the Supreme Judicial Court of Massachusetts

[redacted]

BRIEF FOR DEFENDANT IN ERROR

[redacted]

HENRY C. ATWILL,

[redacted]

WM. HAROLD HITCHCOCK,

[redacted]

Supreme Court of the United States

OCTOBER TERM, 1915

No. 314

CHENEY BROTHERS COMPANY, LANSTON MONOTYPE MACHINE COMPANY, LOCOMOBILE COMPANY OF AMERICA et al.,

PLAINTIFFS IN ERROR,

v.

THE COMMONWEALTH OF MASSACHUSETTS

In Error to the Supreme Judicial Court of Massachusetts

BRIEF FOR DEFENDANT IN ERROR

HENRY C. ATTWILL,
Attorney-General for the Commonwealth of Massachusetts

WM. HAROLD HITCHCOCK,
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No. 314.

CHENEY BROTHERS COMPANY, LANSTON MONOTYPE MACHINE COMPANY, LOCOMOBILE COMPANY OF AMERICA ET AL., *Plaintiffs in Error,*

v.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error brought by seven corporations, namely, Cheney Brothers Company, Lanston Monotype Machine Company, Locomobile Company of America, Northwestern Consolidated Milling Company, Copper Range Company, The White Company and the Champion Copper Company, to reverse a decree entered by the Supreme Judicial Court of Massa-

chusetts on October 20, 1914, dismissing their petitions to recover the amount of certain foreign corporation excise taxes paid by them to the Commonwealth of Massachusetts. It is claimed that these taxes were imposed in violation of the "commerce clause" of the Federal Constitution and of the "due process of law" and "equal protection of the laws" clauses of the Fourteenth Amendment.

These petitions and a similar petition by the Pocahontas Fuel Company were consolidated and heard as one case by order of the court. (Record, p. 4.) This consolidated case was heard by the full court of the Massachusetts Supreme Court together with a similar petition brought by the Marconi Wireless Telegraph Company. A decree was entered for repayment of the tax on the petitions of the Pocahontas Fuel Company and the Marconi Wireless Telegraph Company and the petitions of the plaintiffs in error were dismissed as above stated, the decision being reported under the name of Marconi Wireless Telegraph Company *v.* Commonwealth, in 218 Mass. 558.

The facts bearing upon the cases of the respective petitioners will be stated later in this brief in dealing with the merits of the particular cases.

STATUTES.

The provisions of the statutes of Massachusetts providing for the payment, collection and recovery of excises upon corporations in the position of the plaintiffs in error, so far as they are material to the decision of these cases, are as follows: —

St. 1909, c. 490, Part III., § 39.

"The term 'domestic business corporation' as used in this act shall mean every corporation of the classes enumerated in section one of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three; the term 'foreign corporation' shall mean every corporation, association or organization of the classes enumerated in section fifty-eight of said chapter."

St. 1903, c. 437, § 58.

"Every such foreign corporation (that is, every corporation established under laws other than those of the commonwealth, having a capital stock and established for the purpose of carrying on business for profit, but excluding the telegraph, railroad and other companies not included by the statute, and others covered by distinct provisions; see §§ 56, 7, 1) which has a usual place of business in this commonwealth, or which is engaged in this commonwealth, permanently or temporarily, and with or without a usual place of business therein, in the construction, erection, alteration or repair of a building, bridge, railroad, railway or structure of any kind, shall, before doing business in this commonwealth, in writing appoint the commissioner of corporations and his successor in office to be its true and lawful attorney upon whom all lawful processes in any action or proceeding against it may be served, and in such writing shall agree that any lawful process against it which is served on said attorney shall be of the same legal force and validity as if served on it, and that the authority shall continue in force so long as any liability remains outstanding against it in this commonwealth. The power of attorney and a copy of the vote authorizing its execution, duly certified and authenticated, shall, upon payment of the fee hereinafter provided, be filed in the office of the commissioner, and copies certified by him shall be sufficient evidence thereof. Service of such process shall be made by leaving a copy of the process and a fee of two dollars in the hands or in the office of the commissioner, and such service shall be sufficient service upon the corporation."

St. 1909, c. 490, Part III., §§ 54, 55, 56, 58 and 70.

"SECTION 54. Every foreign corporation shall annually, within thirty days after the date fixed for its annual meeting, or within thirty days after the final adjournment of said meeting, but not more than three months after the date so fixed for said meeting, prepare and file in the office of the secretary of the commonwealth, upon payment of the fee provided in section ninety-one of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three, a certificate signed and sworn to by its president, treasurer, and by a majority of its board of directors, showing the amount of its authorized capital stock, and its assets and liabilities as of a date not more than ninety days prior to said annual meeting, in such form as is required of domestic business corporations under the provisions of section forty-five of said chapter, and the change or changes, if any, in the other particulars included in the certificate required by section sixty of said chapter, made since the filing of said certificate or of the last annual report.

SECTION 55. A certificate which is required to be filed by the preceding section shall be accompanied by a written statement under oath by an auditor, as provided in section forty-seven of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three, except that such auditor shall in all cases be chosen by the board of directors. Before it is filed it shall be submitted to the commissioner of corporations, who shall examine said certificate and shall as tax commissioner assess upon the corporation an excise tax in accordance with the provisions of the following section. If he finds that the certificate is in compliance with the requirements of the preceding section, he shall indorse his approval thereon; but no certificate shall be filed until he has indorsed his approval thereon, and until the excise tax required by the following section has been paid to the treasurer and receiver-general.

SECTION 56. Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to

the treasurer and receiver-general, for the use of the commonwealth, an excise tax to be assessed by the tax commissioner of one fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars.

. . . . . .

SECTION 58. If a domestic business corporation fails to file its tax return before the tenth day of May of each year, or if a foreign corporation omits to file the certificate as required in section fifty-four, the tax commissioner shall give notice by mail, postage prepaid, to the corporation of its default, directed, in the case of a foreign corporation, to the resident manager, if any in the United States, or to any other person designated by the corporation, by written notice filed in the office of the commissioner, as provided in section fifty-nine of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three for notice of the service of legal process, which notice to said foreign corporation shall contain a copy of this section and of sections sixty-five to sixty-eight inclusive of said chapter. If such business or foreign corporation fails to file such return or certificate within thirty days after such notice of default has been given or mailed, it shall forfeit to the commonwealth not less than five nor more than ten dollars for each day for fifteen days after the expiration of the said thirty days, and not less than ten nor more than two hundred dollars for each day thereafter during which such default continues, or any other sum, not greater than the maximum penalty or forfeiture, which the court may deem just and equitable, which, in the case of a foreign corporation, shall be recovered as herein provided.

Penalties and forfeitures incurred by any domestic business or foreign corporation which, being subject to the provisions of this act, omits to cause any certificate or return which may be required by the provisions of sections forty and fifty-four to be duly filed may be recovered in an action brought in the county

of Suffolk in the name of the commonwealth, or they may be recovered by an information in equity in the name of the attorney-general at the relation of the tax commissioner, brought in the supreme judicial court in the county of Suffolk. Upon such information, the court may issue an injunction restraining the further prosecution of the business of the corporation named therein until such penalties or forfeitures, with interest and costs, have been paid, and until the returns and certificates required by this act have been filed.

. . . . . .

SECTION 70. Any corporation or association aggrieved by the exaction of said tax or excise or of any portion thereof may, within six months after the payment of the same, whether such payment be after or before the issue of the warrant mentioned in the preceding section, apply by petition to the supreme judicial court, setting forth the amount of the tax or excise and costs thereon so paid, the general legal grounds and the specific grounds in fact, if any, upon which it is claimed such tax or excise should not have been exacted. Said petition shall be the exclusive remedy and shall be entered and heard in the county of Suffolk. A copy of the same shall be served upon the treasurer and receiver general and upon the attorney-general. The proceedings upon such petition shall conform, as nearly as may be, to proceedings in equity, and an abatement shall be made of only such portion of the tax or excise as was assessed without authority of law. In case said tax or excise has heretofore been exacted or is hereafter exacted in consequence of any law or statute of any other state of the United States, then the application above provided for may be made at any time within six years after the exaction of said tax or excise or any portion thereof."

ARGUMENT.

I.

History of Massachusetts Foreign Corporation Excise Tax.

The system of taxing foreign corporations now in force in Massachusetts originated in substantially its present form in St. 1903, c. 437. That statute required every foreign corporation organized for general business purposes (§§ 56, 7, 1) "which has a usual place of business in this commonwealth, or which is engaged in this commonwealth, permanently or temporarily, and with or without a usual place of business therein, in the construction, erection, alteration or repair of a building, bridge, railroad, railway or structure of any kind" (§ 58) to comply with certain provisions of law and annually to file (§ 66) a sworn certificate of its financial condition, showing, among other items, its authorized capital stock. Section 75 then provided:

> "Every foreign corporation of the classes described in section fifty-eight shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, an excise tax to be assessed by the tax commissioner of one hundredth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but it may deduct from such tax the amount of taxes upon property paid by it to any city or town in the commonwealth during the preceding year, and the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars."

This statute did not apply to or impose any form of taxation upon banks, trust companies, surety companies, insurance companies, railroad or street railway companies, telegraph or telephone companies, or other similar corporations, engaged either in public service or in enterprises not commonly undertaken or permitted by ordinary business corporations.

St. 1903, c. 437, § 1.
Baltic Mining Co. *v.* Commonwealth, 207 Mass. 381, 387.

Special forms of taxation upon a different basis were then and are still in force as to many of these classes of corporations.

St. 1909, c. 490, Part III., §§ 26–37, insurance companies; §§ 47–51, street railways; § 40, telegraph companies; §§ 72–79, express companies.

On June 28, 1907, by St. 1907, c. 578, the section above quoted imposing this tax was amended by increasing the rate of the tax to one-fiftieth of one per cent. and by repealing the right given to deduct from the amount of the tax the amount of any taxes upon property paid to any city or town during the preceding year. This amendment did not go into effect until May 1, 1908, nearly a year after its passage. (St. 1907, c. 578, § 2.) Thus amended this section (now, by a codification of all the tax laws, St. 1909, c. 490, part III., § 56) is as follows:

"Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer

and receiver general, for the use of the commonwealth, an excise tax to be assessed by the tax commissioner of one fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars."

This section together with the other provisions of the statutes relating to the taxation of foreign corporations applicable to the cases at bar are set forth in this brief pages 2–6. No material change other than that just stated has been made in the original statute of 1903, and it was in force in this form when the taxes involved in the cases at bar were determined and paid.

In Attorney-General *v.* Electric Storage Battery Co., 188 Mass. 239, the Supreme Judicial Court of Massachusetts construed this statute as not including or imposing a tax upon "corporations whose usual place of business is established and maintained solely for use in interstate commerce" (p. 241). It therefore held that the statute was not unconstitutional as an interference with interstate commerce and enforced its provisions against a corporation engaged in both interstate and intrastate commerce, enjoining it from "the further prosecution of the defendant's business in this Commonwealth, except the business of disposing of its goods as a part of interstate commerce, until this forfeiture, with interest and costs, is paid, and the certificate required by the statute is filed" (p. 242).

After the decision by this court of the cases of Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, and Pullman Co. *v.* Kansas, 216 U. S. 56, the constitutionality of this statute was again considered by the Massachusetts court and reaffirmed in Baltic Mining

Co. *v.* Commonwealth, 207 Mass. 381, the court holding that the tax was strictly an excise tax "for the commodity or privilege of having an establishment for business in Massachusetts, with the protection of our laws and the financial and other advantages of a situation here" (p. 388). The court thus summarized its conclusions as to the application of the statute:

> "In our former adjudication upon it we expressed the opinion that it was inapplicable to cases where a foreign corporation had its place of business here only for use in interstate commerce. It is not to be inferred that the Legislature intended the statute to go beyond the constitutional authority of the Commonwealth. We have already referred to the policy of our law in reference to such corporations as railroads, telegraph companies, electric railways, express companies, and the like. In view of these legislative expressions of policy and in view also of the late decisions relied on by the petitioner, we hold that the statute before us would be inapplicable to a foreign corporation for the taxation of which there is no special provision in our statutes, if it should be engaged in the work of conducting some kind of interstate commerce for hire as its principal function, and at the same time should be engaged in intrastate business so closely connected with the interstate commerce that it could not be given up without serious detriment to the interstate commerce, so that its condition in this respect would be like that of the Western Union Telegraph Company."

In S. S. White Dental Manufacturing Co. *v.* Commonwealth, 212 Mass. 35, the Massachusetts court again thoroughly considered the nature of this tax and reiterated that it was a reasonable excise imposed upon the privilege of doing business within the Commonwealth. The court said:

"This tax then must be regarded in the light of our taxation history and system as intended by the Legislature and interpreted by the courts as a pure excise tax. Upon no other ground could it be sustained under our own Constitution. In no sense can it be regarded under our jurisprudence as a property tax."

See also Keystone Watch Case Co. *v.* Commonwealth, 212 Mass. 50.

In each of the foregoing cases the court found that the corporation before it was engaged in business in the Commonwealth distinct from interstate commerce and required it to pay the excise imposed by the statute under a penalty of injunction restraining it from carrying on business in the Commonwealth other than interstate commerce.

The Baltic Mining Company and S. S. White Dental Manufacturing Company cases were brought before this court on a writ of error. 231 U. S. 68. This court expressly adopted the view of the Massachusetts Supreme Judicial Court as to the character and application of the tax in question.

"We have no fault to find with the conclusion that this is an excise tax. See also Provident Institution *v.* Massachusetts, *supra;* Hamilton Co. *v.* Massachusetts, *supra*, in which this court had occasion to consider the taxing system of Massachusetts. That the State may impose a tax upon a corporation, foreign or domestic, for the privilege of doing business within its borders is undoubted, and such has long been the legislative policy of the Commonwealth of Massachusetts, as appears from the history of legislation set forth in the opinions in the cases last cited. Construing the act in question, the Supreme Judicial Court of Massachusetts has held that it does not

apply to corporations engaged in railroad, telegraph, telephone, etc., business which are taxed on another plan under the provisions of the statute. It is held not to apply to corporations whose business is interstate commerce or who carry on interstate and intrastate business in such close connection that the intrastate business cannot be abandoned without serious impairment of the interstate business of the corporation. And the statute, it is held, does not apply to corporations which have places of business for the transaction solely of interstate commerce. Attorney General *v.* Electric Storage Battery Co., 188 Massachusetts, 239. The tax is levied upon the privilege of carrying on business within the State and not upon property therein which is otherwise taxed" (pp. 84, 85).

In dealing with the contention that this tax is a direct burden upon interstate commerce and an attempt to tax property beyond the jurisdiction of the State, this court said:

"Every case involving the validity of a tax must be decided upon its own facts, . . ." (p. 85).

"An examination of the previous decisions in this court shows that they have been decided upon the application to the facts of each case of the principles which we have undertaken to state, and a tax has only been invalidated where its necessary effect was to burden interstate commerce or to tax property beyond the jurisdiction of the State. In the cases at bar the business for which the companies are chartered is not of itself commerce. True it is that their products are sold and shipped in interstate commerce, and to that extent they are engaged in the business of carrying on interstate commerce and are entitled to the protection of the Federal Constitution against laws burdening commerce of that character. Interstate commerce of all kinds is within the protection of the Constitution of the United States, and it is not within the authority of a State to tax it by burdensome laws. From the statement of facts it is apparent, however, that each of the corporations in question is

carrying on a purely local and domestic business quite separate from its interstate transactions. That local and domestic business, for the privilege of doing which the State has imposed a tax, is real and substantial and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business of the companies involved" (p. 86).

"The conclusion, therefore, that the authorized capital is only used as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the State. So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the State's jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized capital stock it is used only as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable" (p. 87).

After considering the particular facts of these cases the court held, —

"As this statute has been construed by the Supreme Judicial Court of Massachusetts, and applied in these cases, we are unable to find that the tax imposed violates the constitutional rights of the plaintiffs in error" (p. 88).

By this decision this court definitely upheld the general scheme of the Massachusetts foreign excise tax as a valid and constitutional exercise of the taxing power of the State, in effect declaring that it was not a mere device to reach and burden interstate commerce. That issue is no longer open. The general scheme of the tax having clearly been held to be valid, the only matters now open to litigation arise out of the manner in which this valid system of taxation is administered in particular cases.

II.

Principles Established.

The foregoing decisions definitely established the principles to be applied in determining the validity of taxes imposed under this statute. These principles may be stated as follows:

1. The tax imposed by this statute is strictly an excise tax for the commodity or privilege of having an establishment for business in Massachusetts, and is not a property tax.

a. It is reasonable in its amount: and

b. The entire par value of the authorized capital stock of a corporation may be used as a measure of the tax without the necessary effect of burdening interstate commerce in which the corporation may be engaged or of taxing property beyond the jurisdiction of the State.

2. The statute does not apply: —

a. To railroad, street railway, telephone, telegraph, express, and similar corporations taxed under a different plan.

b. To corporations which have places of business in the State solely for the transaction of interstate commerce.

c. To corporations whose business is interstate commerce or which carry on interstate and intrastate business in such close connection that the intrastate business cannot be abandoned without serious impairment of the interstate business of the corporation.

3. The statute thus interpreted is constitutional.

4. The court will consider the particular facts of each

case and determine from the nature and character of the business of the corporation before it whether —

a. It is engaged within the State solely in interstate commerce; or

b. Its intrastate business is so inextricably connected with its interstate business that in the particular instance the tax becomes a direct burden upon the latter.

A tax under this statute will be invalid under the commerce clause only when one of these propositions is plainly apparent from the facts of the particular case.

III.

Issue.

The established principles just suggested must be applied to the corporations at bar by an analysis of the facts disclosed by the record in each case. Only in the event that the tax is found to impose a direct burden upon interstate commerce as already defined will it be held invalid under the commerce clause. This was precisely the manner in which the court below disposed of the cases. (Record, pp. 36–46.)

In the Marconi Wireless Telegraph Co. case the court found that the petitioner was engaged exclusively in foreign commerce by means of transmitting messages to and from ships and foreign countries by wireless telegraphy. Therefore, plainly "it is not within the purview of the statute." (Record, p. 36.)

The Pocahontas Fuel Company was found to be engaged in Massachusetts solely in the business of selling, by contracts made in New York, coal bought in other states to customers in New England and arranging its transportation to them from Virginia. The court held that this business was solely interstate commerce and

that the maintaining of a place of business, with its incidental instrumentalities, for this purpose, was reasonably necessary to the conduct of such interstate commerce, and hence inseparable from it. Accordingly, this petitioner recovered the amount of the tax paid by it on the ground that, its business being solely interstate commerce, the statute did not apply to it.

In each of the remaining cases other than that of the White Company the court analyzed the facts, determined that the petitioner was conducting business in the State other than interstate commerce or business not inextricably connected therewith, and dismissed the petitions. The sole question now properly before this court in these cases is whether that determination was warranted by the facts before the court.

The White Company concedes that it is doing a real and substantial local business, and raises no question as to the validity of its tax under the commerce clause. (Record, p. 19.) Its sole contention is that it has been denied equal protection of the laws under the rule laid down in Southern Railway Co. *v.* Greene, 216 U. S. 400, by reason of the increase of the rate of its tax after it had become established in the Commonwealth. Accordingly, the sole question in this case is whether the rule of that decision applies to the situation of this corporation.

IV.

Certain Immaterial Issues.

Before proceeding to consider the particular facts of each case, it is necessary to dispose of two considerations raised by the plaintiffs in error which the Commonwealth deems to be entirely immaterial to the questions involved in these cases.

A. Ratio of Local Business to Total Business.

In the Baltic Mining Co. case, at page 86, in referring to the business other than interstate commerce carried on by the corporations then before it, this court said:

> "That local and domestic business, for the privilege of doing which the State has imposed a tax, is real and substantial and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business of the companies involved."

The petitioners seize upon this remark and attempt to infer from it that the court is imposing a new limitation upon the power of the states to tax corporations doing a local business. They contend that the ratio of the local business to the total business of the particular corporation must be considered and that the state cannot impose an excise upon the privilege of doing a local business unless the local business is substantial in amount as compared with the total business. Exactly where they draw the line or how they define the somewhat indefinite term "substantial" does not appear.

It is obvious that this remark was intended by the court only as an incidental reference to one of the facts of the particular case then before the court. It is apparent from the opinion that it was never intended to declare that this fact was a decisive element in the case. It was merely one of the circumstances considered by the court in reaching its general conclusion.

In any event, the remark relied upon means nothing more than that a tax cannot be imposed upon the

doing of business so trifling in its character and amount as to be in effect merely a shadow. It was plainly not intended to intimate that a comparison between the total business of the company and its local business necessarily has any bearing upon the validity of a tax upon the privilege of doing the local business. Such a basis for determining the validity of a tax would be directly contrary to previous decisions of this court.

Ficklen *v.* Shelby County Taxing District, 145 U. S. 1.
Flint *v.* Stone-Tracy Co., 220 U. S. 107.

The true basis is clearly stated by Rugg, C.J., in dealing with this issue —

"The test is whether the foreign corporation transacts domestic business substantial in its essence and not by comparison, and reasonably susceptible of separation from its interstate commerce. If it does, the State can fix its own terms so far as license fee is concerned." (Record, p. 35.)

B. Ratio of Local Profits to Amount of Tax.

The petitioners appear to contend that the fact that in particular cases the profits made by a corporation from its local business are small in proportion to the amount of the tax paid for the privilege of doing that business should be taken into consideration.

The Commonwealth contends that that ratio is entirely an immaterial circumstance. It is the opportunity to do business subject to the protection of the laws of the Commonwealth and the other advantages of doing business within its borders that is the subject of the tax, not the making of actual profits from the business

done. The tax is an excise tax on a privilege, not an income tax on net profits.

If it were otherwise, the right to tax in particular cases might depend entirely upon the success of the enterprise in any particular year. Thus it would vary with the wisdom of the management and the success of the business as influenced by a great variety of causes. Such considerations bear upon the use made of a privilege granted but in no wise affect the right to grant or refuse it.

If a tax is unduly great with reference to the actual value of property connected with the business in the State and is entirely out of proportion to the amount of local business done, such facts may be of considerable importance in determining whether the general scheme of a particular excise statute is an honest attempt to impose a tax upon the privilege of doing business in the State or whether it is simply a device to tax interstate commerce through the form of a pretended local tax.

As has already been indicated, that issue is no longer open to these petitioners, since the general scheme of the statute under consideration has been definitely upheld by this court. That being so, taxes imposed under it in particular instances cannot be declared invalid merely because in special cases they seem unduly large.

> New York *v.* Roberts, 171 U. S. 658, 661, 663.
> Pullman Co. *v.* Kansas, 216 U. S. 56, 66, 67.
> Ohio Tax Cases, 232 U. S. 576, 592.

V.

Facts of Each Case Analyzed.

In analyzing the facts in each of the cases now before the court and applying to them the principles established by the prior decisions of this court, it must be borne in mind that the Supreme Judicial Court of Massachusetts has made certain inferences from the facts which appeared before it in the agreed statement of facts. These inferences as to the character of the business done by these corporations in Massachusetts amount to findings of fact made by that court. These findings or inferences, so far as they are reasonably warranted by any statements in the agreed facts, are binding upon this court as ordinary findings of fact.

> Interstate Amusement Co. *v.* Albert, 239 U. S. 560, 566.
> Waters-Pierce Oil Co. *v.* Texas, 212 U. S. 86, 97.
> Rankin *v.* Emigh, 218 U. S. 27, 32.

It follows, therefore, that the conclusions of fact reached by the Massachusetts court and stated in its opinion ought not to be disregarded by this court, unless it can say that there is no reasonable basis for them disclosed by the record.

From this point of view we proceed to examine the facts of the particular cases before the court.

Cheney Brothers Company. (Record, p. 11.)

This corporation is organized under the laws of Connecticut, with an authorized capital of $7,000,000. Accordingly, it paid a tax of $1,400. Its home office and apparently its manufacturing establishment are in Connecticut. It maintains in Boston an office and salesroom with one office salesman and four traveling salesmen who cover New England. A stock of samples is kept at the Boston office, but no other goods. The salesmen take orders which are subject to approval by the home office in Connecticut and the goods are shipped directly from Connecticut to the customer.

No books of account are kept in Boston and no collections are made. No deposits of funds are made in Massachusetts except for the expenses of the Boston office. Money for this purpose is sent to that office from the treasury in New York and the average of this deposit is about $250. Other expenses are paid from New York. The contracts of sale made by this corporation are completed in Connecticut where the title passes.

Plainly this corporation is engaged in Massachusetts in business entirely other than interstate commerce.

1. It maintains in the Commonwealth a permanent home as the headquarters for its New England business.

Here is the starting point of its traveling salesmen who cover New England. Here they get their samples and to this office the New England customers of the company resort to examine samples, to give orders or to transact any other business connected with their purchases from the company. Doubtless here too are fixed the terms of many sales, subject only to the formal approval of the company at its home office.

The maintenance of such a permanent home must be held to be "the keeping of an office within the State for the use of its officers, stockholders, agents and employees", which was declared to be a "matter dependent on the will of the State" in Pembina Mining Co. *v.* Pennsylvania, 125 U. S. 181, 186.

Home Silver Mining Co. *v.* New York, 143 U. S. 305.
New York *v.* Roberts, 171 U. S. 658.

2. Furthermore, this corporation maintains a local salesroom in Massachusetts.

One salesman is on duty continuously at the Boston office. This necessarily means that he is making sales at that office to customers who call there by the use of the stock of samples there maintained. Even if all the goods thus sold are delivered to the purchasers only through the instrumentality of interstate shipments, the privilege of maintaining such a local salesroom is not free from taxation under the commerce clause. It is a local privilege granted by Massachusetts.

Such a case does not come within the so called "drummer cases" relied upon by the petitioner. This was regarded as too plain to be challenged by Waitt, C.J., in his dissenting opinion in Robbins *v.* Shelby County Taxing District, 120 U. S. 489, 500.

Those cases apply only to the solicitation of orders for interstate shipment by itinerant drummers who have no fixed place of business within the State.

3. Moreover, this corporation, through the agency of its Boston office and the salesmen connected therewith, is selling and delivering goods from its home establishment in Connecticut to its Connecticut customers.

The salesmen from its Boston office cover New England. Necessarily that includes Connecticut as well as the other States that comprise this definitely recognized group of States. Thus, orders taken in Connecticut from residents of that State by a salesman connected with the Boston office, after being recorded in that office, are delivered by the corporation directly to these customers and entirely within that State. Apparently, also, orders are given personally by Connecticut customers to the Boston office and then delivered to them entirely within the State. See opinion of Rugg, C.J. (Record, p. 38.)

Unquestionably the maintenance of an office in Massachusetts for the purpose of selling goods to be delivered by a Connecticut corporation from its Connecticut establishment to Connecticut customers has no conceivable connection with interstate commerce.

The foregoing considerations taken singly or together plainly indicate that this corporation was not maintaining an office in Boston exclusively for interstate commerce and that the tax imposed upon it was in no sense a burden upon such commerce. It follows that its petition to recover the tax paid by it was properly dismissed by the Massachusetts court.

Lanston Monotype Machine Company. (Record, p. 12.)

This corporation is organized under the laws of Virginia, with an authorized capital of $10,000,000, and accordingly paid a tax of $2,000. It manufactures type setting machinery at Philadelphia, Pennsylvania. It maintains in Boston an office where are employed a manager, an office manager and four inspectors, all of whom act as salesmen. Orders taken by these sales-

men, subject to the approval of the president at the home office, are filled by shipments from Philadelphia directly to the customer, the machines being delivered to a railroad in Philadelphia.

A stock to replace and to repair broken parts of the machines is kept constantly on hand at the Boston office and is replenished weekly from Philadelphia. From this stock parts are supplied by direct sale for about half the repairs made on the company's machines in New England, amounting to about $12,000 per year. The keeping and sale of this stock in Boston is an inducement to the trade to buy these machines. The petitioner's competitors keep no such stock.

Assuming that the sales and deliveries of completed machines, as made by this company, are solely interstate transactions, it is plain that the business of replacing broken parts is not only a purely local one, but one wholly distinct from the interstate business of selling and delivering machines. The petitioner's competitors keep no such stock of repair parts in Massachusetts. Apparently the petitioner maintains this local business not so much for the comparatively small profit which it receives from it as for the advantage which such a stock gives it over its competitors in permitting it to supply these parts promptly as they are needed. This stock of parts undoubtedly frequently induces prospective customers to purchase of this corporation rather than from its competitors.

Obviously the nature of this business is such that the petitioner could renounce it and still conduct its interstate commerce. In such an event it would be in the same position as its competitors.

It is submitted that on the facts in this case the

petitioner is conducting a business "real and substantial and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business." Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68, 86. This case on its facts is almost identical with Attorney-General *v.* Electric Storage Battery Co., 188 Mass. 239, impliedly approved by this court in the Baltic Mining Company case. In that case a tax was sustained upon a corporation engaged largely in interstate commerce, upon the ground that it maintained a local station for the purpose of making repairs and of supplying to its customers parts for apparatus previously sold by it.

The case of this corporation is fully covered by the decision in Baltic Mining Co. *v.* Massachusetts, *supra*. The decree dismissing its petition should accordingly be affirmed.

Locomobile Company of America. (Record, p. 13.)

This petitioner is incorporated under the laws of West Virginia, with an authorized capital of $5,000,000, and accordingly paid a tax of $1,000. It manufactures automobiles at a factory located in Bridgeport, Connecticut. In Boston it maintains an office and salesroom and a repair shop for the purpose of repairing cars of its own make and second-hand cars of other makes taken in exchange for its own cars. Orders for new cars are taken by the Boston agent and transmitted to the home office in Bridgeport, and the cars required to fill the orders, are then shipped to the Boston agent, who makes the deliveries to the purchasers in accordance with their orders.

In about one-third of its sales of automobiles the

company accepts as part of the consideration a car of any make that may have previously been used by the purchaser. It maintains at its Boston establishment a used car department, where it sells second-hand cars of its own and other makes thus taken in part payment for new cars. A stock of such cars is constantly kept on hand. It also maintains a repair shop and a stock of repair parts for use in repairing its own cars no matter where sold. It occupies a large building and employs thirty persons, ten in the sales and office department and twenty in the repair department.

1. The sales by this petitioner of new cars is not on these facts interstate commerce.

The burden of proof is upon the petitioner, in order to maintain its petition, to establish that the business in which it is engaged is interstate commerce. So far as appears, even in the sales of new cars made by this petitioner in Boston, an automobile is not separated for any particular purchaser until the car reaches the Boston office. As the orders are received, the factory at Bridgeport ships to the Boston agent the cars needed to fill the orders, and that agent makes the deliveries to the customers. He apparently is the one who chooses which car shall go to a given customer. There is no shipment from Bridgeport to Massachusetts customers, and thus no interstate delivery.

So far as appears, therefore, even the sales of new cars made by this company are to be treated as sales from a local stock. At least, the agreed facts are open to that inference, and as the matter is left in doubt the petitioner cannot prevail upon this issue.

2. This petitioner maintains a local repair shop.

Twenty men are employed by the petitioner in the repair shop where used cars taken by it in part payment for new cars are put in condition for sale and where any cars manufactured by the company may be repaired for their customers. For this purpose a stock of parts is always kept on hand. Like the repair department conducted by the Lanston Monotype Machine Company (Brief, p. 24), this repair shop is plainly a local business. It is undoubtedly a convenient incident of its general business of selling automobiles, but it cannot be said to be a necessary incident thereto.

3. The petitioner carries on the local business of selling used automobiles.

Cars taken by it as part payment for new cars are put in condition in its local repair shop and then are sold to local customers at the Boston office. This is purely, the purchase, repair and sale in Massachusetts of second-hand automobiles and is beyond question a local business, desirable and convenient in connection with the main business of the company but not necessarily connected therewith.

Attorney-General *v.* Electric Storage Battery Co., 188 Mass. 239.

S. S. White Dental Manuf. Co. *v.* Commonwealth, 212 Mass. 35, affirmed 231 U. S. 68.

Pennsylvania R. R. Co. *v.* Knight, 192 U. S. 21.

Browning *v.* Waycross, 233 U. S. 16.

Northwestern Consolidated Milling Company. (Record, p. 16.)

This corporation is organized under the laws of Minnesota, with an authorized capital of $2,250,000. Accordingly, it paid a tax of $450. It manufactures flour at its mills in Minnesota and maintains a Boston office which has charge of the business of the company in New England and part of New York. Sixteen traveling salesmen are connected with this office, seven of whom are devoted to the Massachusetts trade. These salesmen take orders for flour and other similar products from retailers and then the orders are turned over by the petitioner to the nearest wholesale dealer. The wholesaler fills these orders from his stock and collects the purchase price from the purchaser. These wholesalers buy their stock from the petitioner by orders given to the Boston office. These orders are filled by shipments from the petitioner's mills in Minnesota to the wholesalers. In no case is there any approval of the orders given by the wholesalers to the petitioner by its home office.

1. This petitioner, through its Massachusetts salesmen, acts as agent for local wholesale dealers, in selling to local retail dealers.

The salesmen of this petitioner are not engaged in taking orders to be filled by interstate shipments. They are not in any sense taking orders for deliveries to be made by the petitioner. They are acting as agents not of the petitioner but of the wholesale dealers in taking orders for their benefit.

Seven of the petitioner's sixteen salesmen thus act as agents of Massachusetts wholesalers in selling to Massa-

chusetts retailers. The larger part of the petitioner's business appears to be furnishing in this manner salesmen to act as agents for domestic wholesale dealers. Such business has plainly no connection with interstate commerce. The fact that it expects to receive orders from the wholesale dealers for the stock of flour necessary to enable the latter to fill the orders of the retailers is merely the motive for the conduct of the petitioner in furnishing such agents. It does not change the character of the business done by it.

2. The petitioner also keeps on hand a small stock of flour in Boston and makes sales from it for delivery in Massachusetts. (Record, p. 17.)

This is obviously a local business, unessential to any interstate business and, therefore, renders the petitioner taxable on this ground alone. The fact that this local stock is small does not make it any less a domestic business or so entangle it with interstate commerce as to make the two inseparable.

3. The sales of the petitioner to wholesale dealers in Massachusetts are consummated in that State.

The wholesale dealers, customers of the petitioner, purchase their stock by orders given by them and received and accepted at the Boston office. The agreed facts expressly recite: — "In no case is there any approval of orders by the home office." (Record, p. 17.) The contract of sale thus is completed upon the acceptance of the order by the Boston office. Nothing remains to be done but for that office to arrange for the delivery of the goods ordered either from its local stock, if the amount ordered is small, or by shipment from Minnesota, if the order is large. We contend that these facts alone indicate that this branch of the busi-

ness of the petitioner is not interstate commerce, but the selling of flour in Massachusetts by the Boston office to Massachusetts wholesale dealers.

These three points, taken singly or together, establish beyond question that the petitioner is carrying on a business in Massachusetts purely local in character and entirely distinct from interstate commerce. Its petition to recover the tax paid was, therefore, properly dismissed.

Copper Range Company.

This petitioner is incorporated under the laws of Michigan, with an authorized capital of $2,500,000, and accordingly paid a tax of $500. Its articles of association state that "the place where the business office of this corporation is located, without the limits of the State of Michigan, is Boston, Massachusetts." It is a holding company whose chief asset is stock in a foreign mining corporation. It also owns stocks and bonds of a Michigan railroad and certain mineral lands in that State.

Its activities in Massachusetts consist of the receipt of dividends on the stock owned by it, the deposit of the same in Boston banks and the payment therefrom of its officers' salaries and expenses and of dividends to its stockholders. The president and treasurer are residents of Massachusetts and apparently the office of the treasurer is in Massachusetts. The corporation holds its directors' meetings three or four times a year and also its annual stockholders' meeting in Boston. It receives dividends on stock owned by it monthly and pays dividends to its stockholders three or four times a year.

Plainly this corporation transacts no commerce, either interstate or intrastate, in Massachusetts or elsewhere.

> Paul *v.* Virginia, 8 Wall. 168, 183.
> Hooper *v.* California, 155 U. S. 648, 655.
> Ware and Leland *v.* Mobile County, 209 U. S. 405.

Its business is investments in stocks and other properties more or less incidental to the mining business and not trading of any description. No tax, therefore, levied upon this petitioner can in any sense be a burden upon interstate commerce or an interference therewith in violation of the commerce clause of the Federal Constitution.

The Massachusetts court ruled (Record, p. 43) that the functions transacted by this corporation in Massachusetts constituted the doing of business therein, within the meaning of the Massachusetts foreign corporation excise tax statute. (Brief, p. 3.) Obviously this ruling raises no Federal question whatever. It merely involves the construction of the Massachusetts statute by the Massachusetts court. It is fundamental that this construction, adopted by the highest court of the state, will be followed by this court.

> Northern Pacific Ry. Co. *v.* Meese, 239 U. S. 614, 619.
> Old Colony Trust Co. *v.* Omaha, 230 U. S. 100, 116.

As something is done by this corporation in Massachusetts which is not commerce, the only remaining question is whether the statute has attempted to reach

a corporation doing what this corporation is doing. That is purely a matter of local law.

Accordingly we submit that no question within the jurisdiction of this court is presented by the record, so far as it concerns this petitioner, and that therefore the writ of error should be dismissed for want of jurisdiction so far as it is concerned.

In any event this corporation is carrying on activities in Massachusetts which are within the power of that State to tax. Substantially its entire business is there carried on. Its charter establishes a permanent home for the corporation in Massachusetts and there its directors' and stockholders' meetings are held. Its president and treasurer reside in Massachusetts, maintain their offices there, and the corporate and financial records of the company are kept there. A holding company naturally has no business other than holding directors' and stockholders' meetings, receiving dividends, paying salaries to officers and clerks and distributing its profits. All these transactions are conducted in Massachusetts. The exaction of a license fee for the privilege of exercising these functions in Massachusetts is well within the power of the State.

Champion Copper Company.

This petitioner is organized under the laws of Michigan, with an authorized capital of $2,500,000, and accordingly paid a tax of $500. Like the last-mentioned petitioner its articles of association state that the "place where the business office of this corporation is located, without the limits of the State of Michigan, is Boston, Massachusetts." It owns a copper mine in Michigan where its copper is mined. Its product is

sold exclusively by a selling agent in New York, who represents the petitioner only in making the contracts of sale, in collecting the amounts due from purchasers and in remitting the proceeds to the treasurer of the petitioner. Deliveries are made by interstate shipments from Michigan.

The president, treasurer and five of the seven directors reside in Massachusetts and directors' meetings are held there. The office of the treasurer is in Boston, and at that office all deliveries of copper under contracts of sale made by the selling agent are ordered, superintended and directed, and from it the sales agent is kept informed of the amounts of copper to be sold and the prices to be charged. At that office the bookeeping covering such sales and deliveries is carried on. Deposits of funds arising from sales and deliveries are made in Boston, and the funds so received, after the payment of expenses, are distributed in dividends among the shareholders of the company from that office. The company's mine in Michigan is by a vote of the board of directors under the exclusive management of a general manager resident there. The general management and control of all the business and property of the company is in its board of directors.

1. The petitioner has established in Massachusetts an office for the management of all its interstate commerce as distinct from that commerce itself.

There is no connection between the place where this corporation has established an office for the management and direction of its interstate commerce and that commerce itself. It has apparently selected Boston as a convenient and attractive place for this purpose because of financial, economic and other

reasons of convenience, including the fact that its officers and directors are resident there.

This office is not established merely to supervise interstate commerce between purchasers in Massachusetts or other nearby states and the Michigan mine of this company. The petitioner has gone much further and established in Massachusetts an office for the management of all its interstate commerce, whether between Michigan and Massachusetts or between Michigan and distant western States or foreign countries.

It is submitted that taxing such an office, even though there were no other grounds for taxing it, would not be imposing a direct burden upon interstate commerce. It would be rather exacting a license for the privilege of maintaining in the State a general office for the supervision of all its shipments.

Such an office would naturally be located at the domicil of the corporation. To say that Massachusetts cannot tax the privilege of maintaining such an office would make it necessary also to hold that Michigan, where this corporation is formed, could not impose a franchise tax upon it for the same reason. So far as we have discovered no decision has gone to this length.

2. This petitioner maintains an executive office in Massachusetts for the management of all its business.

In that State the entire management of the corporation is located, its directors' meetings held, and its president's and treasurer's offices maintained. Its bookkeeping is there conducted, also its funds deposited and the dividends to its shareholders paid.

It is immaterial that the management of its mine in Michigan has been delegated, by vote of the board

of directors, to a general manager resident in that State. Of necessity the directors have the right to supervise that management and to control it if they desire. They can at any time modify the authority of the general manager or remove him from office. They plainly have the right to direct, and in fact are directing, the management of the mine in Michigan from the office in Massachusetts. Clearly this is entirely independent of interstate commerce.

To paraphrase the language of the court in Pembina Mining Co. *v.* Pennsylvania, 125 U. S. 181, 184, Massachusetts is only exacting a license tax from this corporation on the ground that it has an office in the Commonwealth for the use of its officers, stockholders, agents and employees.

The case of this corporation on its facts is indistinguishable from Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68, 79.

The White Company.

This corporation is established under the laws of Ohio, with an authorized capital of $3,000,000, and accordingly paid a tax of $600. It admits that it is doing a real and substantial local business separable from its interstate business, and raises no question of immunity from taxation under the commerce clause. Its sole complaint is that it has been denied equal protection of the laws of Massachusetts, which is insured to it by the Constitution of that Commonwealth and of the United States.

After 1903 and prior to 1909 it acquired land in Boston and built a seven story brick, concrete and steel building thereon of heavy construction especially adapted for use

as a garage. It installed gasoline tanks and other apparatus particularly useful in such a garage, its total investment in this building approximating $175,000. Between the same dates it acquired for $100,000 about 7,000 feet of land adjoining the first-mentioned property and a building thereon then used as a stable. This building was altered and remodeled by it at an expense of $22,000 for a service station. It has not used or occupied this property for several years and has offered it for sale, but has not yet sold or leased it.

This petitioner relies upon the decision in Southern Railway Co. *v.* Greene, 216 U. S. 400. The point of this case was thus stated by this court in Baltic Mining Co. *v.* Commonwealth, 231 U. S. 68, 87:

"In that case the railway company had gone into the State of Alabama and, under authority of the State, acquired a large amount of railroad property upon which it paid taxes as well as a license tax imposed by the State. After the payment of all such taxes and in this condition of affairs, the State undertook to levy upon the railroad company a privilege tax because it was a foreign corporation, not imposing the same tax upon domestic corporations doing precisely the same business. This court held that the railroad company was a person within the meaning of the Constitution and entitled to the equal protection of the laws and that by the taxation of its railroad property under such circumstances it was denied the equal protection of the law, no like tax being levied upon domestic corporations. It was said in that case (p. 416):

'We have here a foreign corporation within a State, in compliance with the laws of the State, which has lawfully acquired a large amount of permanent and valuable property therein, and which is taxed by a discriminating method not employed as to domestic corporations of the same kind, carrying on a precisely similar business.'"

1. We submit that this petitioner has acquired no permanent property in Massachusetts, within the meaning of the Greene case.

In the first place, it is to be noted that it does not appear from the record whether the property now owned by this corporation was acquired by it prior to the passage of St. 1907, c. 578, increasing the tax from that established by St. 1903, c. 437. It is plain that this property was acquired after the tax at the rate set forth in St. 1903, c. 437, § 75, had been established, and the record leaves it in doubt whether it was acquired before the increase of rate in 1907, or after that increase. Only in the event that it is made plain that the property was acquired before 1907 does the petitioner's contention have any force whatever.

Assuming, however, that the property described in the record was already acquired before the increase in rate of this excise referred to, the record does not show that the corporation had acquired a permanent property irretrievably devoted to its uses, as had the corporation before this court in the Greene case. This phase of the matter cannot be better stated than by quoting the language of Chief Justice Rugg in dealing with this contention in the case at bar. (Record, p. 45.)

"The real estate acquired by this petitioner is of a kind adapted to a very considerable and increasing business, in which there is general competition. The storage and care of automobiles and the performance of necessary service for their repair, maintenance and operation is a widespread business in which large amounts of capital are invested and considerable numbers of persons are engaged. Such establishments are frequent subjects for lease and sale. There is nothing to indicate or to warrant the inference that the petitioner's investment in real estate is not readily salable at reasonable prices. It is

not property of a nature irretrievably devoted to a limited and monopolistic use, and not readily available either for other valuable uses or to other persons ready to devote it to the same uses at prices fairly equivalent, subject to the general vicissitudes of business conditions, to the original investment. The Greene case related to railroad property, which is not susceptible of use for any other purpose without great loss. In that opinion it was said, 'It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed.' 216 U. S. at page 414, citing Ames *v.* Union Pacific Railroad, 64 Fed. Rep. 165, 177. In S. S. White Dental Manuf. Co. *v.* Massachusetts, 231 U. S. 68, at page 88, it was said respecting a similar contention: 'The conditions existing in the Southern Railway Company *v.* Greene case are not presented here. We do not find in this situation an acquisition of permanent property, such as was shown in the Greene case.' The facts in the case at bar are indistinguishable from those before the court in that case. 'Permanent property,' as these words were used in the opinion in the White Dental Company case referring to the Greene case, we interpret to mean at least a kind of property, ownership of which is inherently necessary for the establishment of the business, which must abide in the same ownership, and which cannot in the nature of things be sold in the general market so as to yield a fair return for the cost, less its normal depreciation. At all events, the Greene case does not exonerate this petitioner from liability to the excise."

No case can be pointed out where this court has applied the rule which this petitioner invokes to corporations other than railroad companies. If it can ever be otherwise applied, it can only be done in the case of some corporation devoted to some unusual monopolistic business whose property could by no

possibility be devoted to other business purposes or be sold to individuals engaged in a similar business.

2. Furthermore, it is not shown that Massachusetts in any way discriminates between the petitioner, a foreign corporation, and a similar domestic corporation engaged in similar business.

Plainly it is within the power of the States to impose any reasonable form of taxation upon corporations engaged in doing business within their borders or to increase the rate of taxation already existing, provided all corporations of a similar character, foreign and domestic, are treated alike. The rule of the Greene case does not apply unless in addition to finding that the corporation in question has acquired a permanent property in the State, within the meaning of that decision, it is also found that the State has discriminated against foreign corporations in favor of domestic corporations of a similar character. As this court said, in discussing the Greene case in St. Louis Southwestern Railway Co. *v.* Arkansas, 235 U. S. 350, 367, —

> "Nothing in the Fourteenth Amendment imposes any iron-clad rule upon the States with respect to their internal taxation, or prevents them from imposing double taxation, or any other form of unequal taxation, so long as the inequality is not based upon arbitrary distinctions."

Therefore, for the petitioner to prevail in this proceeding it must show that the laws of Massachusetts impose upon a domestic corporation of the same capital, property and methods of business as itself a lesser tax than has been imposed upon the petitioner.

It becomes necessary, therefore, to examine the Massachusetts statutes as to the taxation of domestic business corporations.

St. 1909, c. 490, part III, with its amendments now in force, so far as applicable to this case, is as follows:

"SECTION 40. Every corporation organized under the general or special laws of the commonwealth for purposes of business or profit, having a capital stock divided into shares, except banks, whose shares are otherwise taxable under the provisions of this part, in addition to all returns required by its charter, and in addition to all returns otherwise required under the provisions of this part, shall annually, between the first and tenth days of April, make a return to the tax commissioner, under oath of its treasurer, stating the name of the corporation, its place of business, and setting forth as of the first day of April of the year in which the return is made: —

. . . . . .

(Certain specified facts as to its property and financial condition.)

"SECTION 41. The tax commissioner shall ascertain from the returns or otherwise the true market value of the shares of each corporation subject to the requirements of the preceding section, and shall estimate therefrom the fair cash value of all of said shares constituting its capital stock on the preceding first day of April, which, unless by the charter of a corporation a different method of ascertaining such value is provided, shall, for the purposes of this part, be taken as the true value of its corporate franchise. From such value there shall be deducted:

. . . . . .

Third, In case of a domestic business corporation, the value of the works, structures, real estate, machinery, poles, underground conduits, wires and pipes owned by it within the commonwealth subject to local taxation, and of securities which if owned by a natural person resident in this commonwealth would not be liable to taxation; also the value of its property situated in another state or country and subject to taxation therein. There shall not be deducted the value of securities which if owned by a natural person resident in this common-

wealth would be liable to taxation; and the tax commissioner in determining for the purposes of taxation the value of the corporate franchise of any such corporation shall not take into consideration any debts of such corporation unless the returns required from it contain a statement duly signed and sworn to, setting forth that no part of such debts was incurred for the purpose of reducing the amount of taxes to be paid by it.

. . . . . .

SECTION 43. Every corporation subject to the provisions of section forty shall annually pay a tax upon its corporate franchise, after making the deductions provided for in section forty-one, at a rate equal to the average of the annual rates for three years preceding that in which such assessment is laid, the annual rate to be determined by an apportionment of the whole amount of money to be raised by taxation upon property in the commonwealth during the same year, as returned by the assessors of the several cities and towns under the provisions of section ninety-three of Part I, after deducting therefrom the amount of tax assessed upon polls for the preceding year, as certified to the tax commissioner, upon the aggregate valuation of all cities and towns for the preceding year, as returned under sections fifty-nine and sixty of Part I; but the said tax upon the value of the corporate franchise of a domestic business corporation, after making the deductions provided for in section forty-one, shall not exceed a tax levied at the rate aforesaid upon an amount, less said deductions, twenty per cent in excess of the value, as found by the tax commissioner, of the works, structures, real estate, machinery, underground conduits, wires and pipes, and merchandise, and of securities which if owned by a natural person resident in this commonwealth would be liable to taxation; and the total amount of tax to be paid by such corporation in any year upon its property locally taxed in this commonwealth and upon the value of its corporate franchise shall amount to not less than one tenth of one per cent of the market value of its capital stock at the time of said assessment as found by the tax commissioner. If the return

from any city or town is not received prior to the twentieth day of August, the amount raised by taxation in said city or town for the preceding year, as certified to the secretary of the commonwealth, may be adopted for the purpose of this determination."

It is impossible to determine from the record, as none of the necessary items are given, what would be the tax upon the petitioner if it should become a domestic corporation in Massachusetts, with its capital stock unchanged and its property holdings the same as they now exist. However, as appears from section 43 just quoted, in such case the excise tax imposed upon its franchise, when added to its local property tax, must "amount to not less than one tenth of one per cent of the market value of its capital stock at the time of said assessment as found by the tax commissioner."

With none of the necessary facts before it, this court cannot determine that there has been any discrimination against this petitioner in the tax of $600 imposed upon it. In such absence of proof its claim must fail. Merely a casual examination of the elaborate provisions of the Massachusetts domestic corporation franchise tax law makes it plain that in all probability, if proper data were before the court, it would appear that if the petitioner were a Massachusetts corporation it would be subject to a much larger tax than the $600 which it pays as a foreign corporation.

The taxable value of the corporation franchise in such a case would be figured (§ 41) as follows: First, the cash value of the petitioner's $3,000,000 capital stock would be ascertained. In case of a successful automobile manufacturing company this could hardly be less than its par value and would probably be sub-

stantially in excess of that amount. From this value would be deducted the value of its Massachusetts real estate, apparently in any event not over $300,000, and the value of any machinery located in Massachusetts and of any securities owned by it taxable to a Massachusetts resident, and also the value of any property situated in another state and there subject to taxation. This latter item would include only real estate and tangible personal property.

> Bellows Falls Power Co. *v.* Commonwealth, 222 Mass. 51, 63.

It is inconceivable that the result of this computation would reduce the taxable value of the franchise below $35,000; yet, if the average rate of taxation throughout the State, determined as provided in section 43, is assumed to be $17.50 per thousand, the tax on that value would still be over $600. If the maximum provision of section 43 proves to be applicable, the value of all the property specified, whether within or without the State, must be included in the positive side of the equation.

> American Glue Co. *v.* Commonwealth, 195 Mass. 528.

This is obviously all pure speculation. It plainly demonstrates, however, not only that this petitioner has shown no discrimination against it, but that, on any fair comparison, the Massachusetts statutes would be found to discriminate not against but in favor of foreign corporations.

VI.

BRIEF OF PLAINTIFFS IN ERROR.

The brief filed by the plaintiffs in error does not fairly argue the real questions presented by the cases now before this court. It is largely addressed to matters not involved in the cases at bar. It not only attempts to reargue questions decided adversely to the contentions of the petitioners in Baltic Mining Company *v.* Commonwealth and S. S. White Dental Manfg. Co. *v.* Commonwealth, 231 U. S. 68, but also, by continued reference and innuendo, discusses matters which can arise only under St. 1914, c. 724, which was not in force at the time of the assessment and payment of the taxes now in question. The continued reference to this statute is entirely immaterial and particularly unfair. It is an attempt to introduce into these cases new issues which can be considered by this court only when a corporation whose capital stock is in excess of $10,000,000 has been taxed under the statute of 1914 and that tax has been sustained by the Supreme Judicial Court of Massachusetts. There is no assurance that such a case will ever reach this court.

1. St. 1914, c. 724.

The important section of this statute is as follows: —

"Section 1. Every foreign corporation subject to the tax imposed by section fifty-six of Part III of chapter four hundred and ninety of the acts of the year nineteen hundred and nine shall in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general for the use of the commonwealth, in addition to the tax imposed by said

section fifty-six, an excise tax to be assessed by the tax commissioner of one one hundredth of one per cent of the par value of its authorized capital stock in excess of ten million dollars as stated in its annual certificate of condition."

This statute was approved and went into effect on July 1, 1914. The tax of the Cheney Brothers Company now in suit was paid on March 4, 1913. (Rec., p. 8.) The precise dates of the payments of the taxes assessed upon the other petitioners do not appear, but apparently they were about the same date. In any event, these petitions were in court, and were consolidated and reported to the full court of the Massachusetts Supreme Judicial Court on February 27, 1914. (Rec., p. 4.) They were argued before that court on March 23, 1914. (218 Mass. 558.) All this occurred before the passage of the statute of 1914, and the Massachusetts court rendered its decision entirely without reference to that statute. Plainly, this subsequent action by the Legislature of Massachusetts can have no possible effect upon the decision in the cases at bar.

Furthermore, the petitioners' brief does not fairly state the effect of this new statute. This statute does not purport to be, and in fact is not, an amendment of section 56 of part III of chapter 490 of the Acts of 1909 or of any other portion of the Tax Act. It refers to that section merely to indicate the corporations to be affected. It then imposes an excise tax, in addition to that already imposed by section 56, upon all corporations included within the scope of that section whose authorized capital stock is in excess of $10,000,000.

Plainly, this statute merely imposes an additional tax on certain foreign corporations. It makes no change whatever in the character of the tax imposed by section 56, in the rate of that tax or in the corporations which are subject to it. It leaves the whole system of Massachusetts foreign corporations excise taxes unchanged, except for this additional tax imposed on large corporations whose capital is above a certain amount.

If for any reason this statute is unconstitutional as a whole, or if, by reason of particular circumstances in individual cases, any tax imposed under it is void, the system of taxation established by section 56 remains unaffected. The additional tax imposed by this statute is plainly separable from the tax imposed under section 56, and a decision that any tax under the statute of 1914 is invalid cannot affect a tax under section 56.

2. Attempt to distinguish Baltic Mining Company Case.

The brief of the petitioners, in the first place, entirely disregards the fact that this court in Baltic Mining Company *v.* Commonwealth approved the general scheme of the Massachusetts statute upon which the taxes under consideration are based; and it then attempts to distinguish that case upon its facts from the cases at bar, upon the alleged ground that the interstate and local businesses of the Baltic Mining Company were separated in locality, in that the interstate sales were made from New York through a selling agency which had no office in Massachusetts. No such suggestion is made by this court in its opinion in

the Baltic Mining Company case. The opinion of the court was clearly based upon the fact that these two branches of the business of the companies then before it were separable in character, and not merely in the locality from which they were conducted.

Furthermore, the distinction suggested is not warranted by the facts in the cases then before this court. In the case of the Baltic Mining Company about 5 per cent. of its total sales in Massachusetts were made from its Massachusetts office (p. 80). In the case of the S. S. White Dental Manfg. Co., also before the court together with that of the Baltic Mining Company, it appears that this company maintained a large salesroom in Boston, employed twelve salesmen there, and sold goods in Massachusetts from this Boston office both for delivery from the Boston stock and for delivery by interstate shipment from its New York and Pennsylvania factories.

In making their attempted distinction of the Baltic Mining Company case the petitioners entirely disregard the facts in the S. S. White Dental Manfg. Co. case decided at the same time. The facts in that case are in no wise distinguishable, so far as separability of business is concerned, from the facts of most of the cases now before this court.

3. Alleged Changes in Attitude by the Massachusetts Court and by the Commonwealth.

An examination of the cases decided by the Massachusetts Supreme Judicial Court, discussed in the first division of this brief, will plainly show that that court has always regarded the sale of goods for delivery by interstate shipment as interstate commerce

within the meaning of the Federal Constitution. In the first case which came before it under this statute (Attorney-General *v.* Electric Storage Battery Co., 188 Mass. 239) the court expressly declined to interfere with the business conducted by the corporation then before it "of disposing of its goods as a part of interstate commerce" (p. 242).

The petitioners confuse the attitude of the court on this question with its suggestion that a distinction is to be made between corporations engaged directly in interstate transportation and corporations which are merely selling goods for interstate delivery upon the question as to whether a particular tax is a direct burden upon interstate commerce or not. The Massachusetts court and this court have said that a given tax may be such a burden when imposed upon transportation companies and yet not necessarily be a direct burden when imposed upon corporations not engaged directly in interstate transportation. This distinction between the effect of taxes imposed upon corporations of the character now before the court and that of the tax under consideration in Western Union Tel. Co. *v.* Kansas, 216 U. S. 1, appears to have been approved by this court in the Baltic Mining Co. case.

Furthermore, until the cases at bar were argued before the Massachusetts Supreme Judicial Court there was nothing in any record or opinion to indicate that the Commonwealth ever claimed that the protection of the Federal Constitution did not extend to the sale of goods for interstate delivery. It is not fair to state that the decision of the Massachusetts court in the case at bar, that sales by interstate delivery consti-

tuted interstate commerce, was "contrary to the long continued and vigorous contentions of the Commonwealth" (Brief of plaintiffs in error, p. 23), when that contention has only been made on one occasion, by one Assistant Attorney-General, and that time unsuccessfully.

4. Right to draw Inferences of Fact.

The brief of the plaintiffs in error (p. 50) contends that the Massachusetts Supreme Judicial Court had no right to draw inferences of fact from the agreed facts, since that right was not reserved in the agreed statement.

Obviously this is a matter of local procedure which cannot be reviewed in this court. Furthermore, the brief does not correctly state the Massachusetts law upon this point. Whatever the law may formerly have been, it is now provided by St. 1913, c. 716, as follows: —

"Section 5. Upon a case stated by agreement of the parties for the decision of the court in any action, suit or proceeding, any court before which such case shall come, either in the first instance or upon appeal or exceptions or other proceedings in the nature of an appeal, shall be at liberty to draw from the facts and documents stated in the case any inferences of fact that might have been drawn therefrom at a trial, unless the parties expressly agree that no inference shall be drawn."

Undoubtedly the court below was authorized by this statute to draw the inferences stated in its opinion and fully justified by the agreed facts in so doing.

VII.

CONCLUSION.

In accordance with the foregoing argument, the defendant in error contends that in all the cases, other than that of the Copper Range Company, the decree of the Supreme Judicial Court of Massachusetts, dismissing the petitions, should be affirmed. In the case of the Copper Range Company the defendant in error contends that the writ of error should be dismissed for want of jurisdiction, but that if not so dismissed the decree dismissing the petition should be affirmed.

Respectfully submitted,

HENRY C. ATTWILL,
Attorney-General for the Commonwealth of Massachusetts.

WM. HAROLD HITCHCOCK,
Assistant Attorney-General.

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 12.

CHENEY BROTHERS COMPANY, LANSTON MONOTYPE MACHINE COMPANY, LOCOMOBILE COMPANY OF AMERICA ET AL.,

PLAINTIFFS IN ERROR,

v.

THE COMMONWEALTH OF MASSACHUSETTS

In Error to the Supreme Judicial Court of Massachusetts.

SUPPLEMENTARY BRIEF FOR DEFENDANT IN ERROR AT REARGUMENT.

HENRY C. ATTWILL,
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v.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SUPPLEMENTARY BRIEF FOR DEFENDANT IN ERROR AT REARGUMENT.

INTRODUCTION.

These cases, involving the constitutional validity of excise taxes assessed by the Commonwealth of Massachusetts, were originally argued on April 20, 1916, before seven of the eight justices then constituting the court. In June, 1917, they were ordered restored to the docket for reargument. It was sought in the original brief for the defendant in error to cover fully all

the questions raised by the record. That brief is referred to as the basis of the reargument; but, in view of the nature of the argument addressed to the court by the plaintiffs in error, it has seemed wise to reargue in a supplementary brief some of the more important issues, considering them with especial reference to the previous decision of this court concerning taxes assessed under precisely the same statute in Baltic Mining Company *v.* Commonwealth, 231 U. S. 68.

I.

Question Involved in these Cases.

In the original brief for the defendant in error the history of the Massachusetts foreign corporation excise tax now before the court is fully outlined, and it is demonstrated that the general scheme of that tax as a valid and constitutional exercise of the taxing power of the state was upheld by this court in Baltic Mining Company *v.* Commonwealth, 231 U. S. 68. This decision, in affirming the validity of the tax there involved, necessarily declared that the method adopted by the Massachusetts statute of imposing an annual excise tax of one-fiftieth of one per cent. of the authorized capital stock of the corporation, but not to exceed $2,000, was constitutionally legitimate and not a mere device to reach and burden interstate commerce; and that, in the absence of special circumstances showing that in fact a burden upon interstate commerce actually resulted in the particular case, the tax will be sustained.

In Kansas City Railway *v.* Kansas, 240 U. S. 227, 235, referring to Baltic Mining Company *v.* Common-

wealth and the tax now under consideration, this court said:

> "It was because the tax, although measured by authorized capital stock, could not in view of its limitations be regarded as imposing a direct burden upon interstate commerce that the tax was upheld."

The taxes involved in the cases at bar were assessed under precisely the same statute as that before the court in the Baltic Mining Company case. The original brief of the plaintiffs in error contains what is apparently a studied attempt to give the court a different impression. St. 1914, c. 724 (Commonwealth's original brief, p. 44), is continually referred to as having *now* removed the $2,000 limit upon this tax. It is nowhere stated that this statute was enacted after the taxes now in question were assessed and after the present litigation was begun. It was conceded in the original argument that this statute has no bearing upon the questions now before the court. Obviously there was no occasion for the frequent unqualified references to it in the brief.

Therefore, the only question now fairly before the court in these cases (other than in White Company Case, see *infra*) is whether upon the particular facts disclosed by the record the operations of any of these corporations are such that this scheme of taxation, valid in its essence, operates as a matter of substance in the particular instance to impose an actual burden on interstate commerce. It must always be borne in mind that "a tax has only been invalidated where its necessary effect was to burden interstate commerce or to tax property beyond the jurisdiction of the State."

Baltic Mining Company *v.* Commonwealth, p. 86. The question must be approached with the caution which this court has itself emphasized, that "if the tax purports to be laid upon a subject within the taxing power of the State, it is not to be condemned by the application of any artificial rule but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction." Kansas City Railway *v.* Kansas, 240 U. S. 227, 233. In other words, to prevail the corporation must establish that the "necessary effect" of the tax was to burden interstate commerce.

This is the only question in these cases other than that of the White Company. The latter company concedes that the tax levied upon it did not impose a burden on its interstate commerce in violation of the commerce clause. Its sole complaint is that it has been denied the equal protection of the laws under the rule laid down in Southern Railway Co. *v.* Greene, 216 U. S. 400.

II.

Baltic Mining Company Case Analyzed.

As issues of precisely the same character as those now raised were involved in the Baltic Mining Company case, it will be helpful to analyze the facts then before the Court more fully than was done in the original brief.

Two cases were before the court when that decision was rendered, that of the Baltic Mining Company and that of the S. S. White Dental Manufacturing Company. The facts in these cases were quite dissimilar, but the manner in which the court dealt with each case is now of prime importance.

The Baltic Mining Company was a Michigan corporation with an authorized capital of $2,500,000, owning and operating a copper mine in Michigan. It had an office in Boston for the use of its president and treasurer, who reside in that city, for the general financial management of its affairs, for the meeting of its directors and for the transfer of its stock. Its only property in Massachusetts was current bank deposits and a certificate of shares of stock in another corporation. It was engaged in mining and refining copper in Michigan. It sold its product exclusively through the agency of the United Metals Selling Company, a New Jersey corporation with an office in New York. Obviously all its sales in Massachusetts or elsewhere than in Michigan, whether consummated in New York or in the state of the purchase were for shipment in interstate commerce, and thus were within the protection of the commerce clause.

Accordingly, the ruling of this court that this corporation was taxable on the ground that it was "carrying on a purely local and domestic business quite separate from its interstate transactions" (p. 86) involved a ruling that the maintenance by a foreign corporation of an office for the use of its president and treasurer in the financial management of its affairs, for holding directors' meeting, for transferring stock and for holding securities owned by the corporation justified a tax even though the chief business of the corporation is the sale of goods for interstate delivery.

The S. S. White Dental Manufacturing Company was a Pennsylvania corporation with an authorized capital of $1,000,000, and was engaged in the business of manufacturing, buying and selling dental supplies,

with its principal office in Philadelphia. Its place of business in Boston consisted of salesrooms, stock rooms and offices where it kept a supply of goods. There was a bookkeeping department at this office and a New England sales agent in charge of it. It was the headquarters of twelve traveling salesmen, who covered New England and the maritime provinces. No manufacturing was done in Massachusetts. Sales of goods were made over the counter and by delivery by messenger, mail or express from the Boston stock in part to residents of Massachusetts and in part to persons resident without the state. Orders were also accepted at this office for delivery from New York and Pennsylvania direct to customers.

It is apparent that sales made by the Boston office of this corporation were in part transactions in interstate commerce and in part purely local transactions. Thus the interstate and domestic business of this concern were carried on together at the same place and by precisely the same instrumentalities. Those instrumentalities, namely, the Boston office, its stock, clerks, traveling salesmen and other employees, its bookkeeping system and bank account, were all used simultaneously for both classes of business at the same place. The attempt of the petitioner to distinguish Baltic Mining Company *v.* Commonwealth on the ground of a separation of domestic and interstate business in locality and instrumentalities thus entirely fails. To apply it the facts of the S. S. White Dental Manufacturing Company are entirely disregarded.

Plainly it follows from this decision that the separability which the court had in mind when it said (p. 86) "each of the corporations in question is carrying on a

purely local and domestic business quite separate from its interstate transactions" was a separability in character and not one of locality and instruments of performance. With reference to the particular facts of the cases then before it, all this court attempted to decide was that the local and interstate transactions of these companies were to such an extent separable that the tax upon the privilege of conducting the local business did not have the "necessary effect" of burdening interstate commerce. It in no way attempted to lay down any specific test for determining similar questions in other cases.

Of course the court did not decide that the corporations then before it were not engaged in interstate commerce or that their interstate business was not entitled to freedom from state interference. The contrary is expressly declared (p. 86).

"True it is that their products are sold and shipped in interstate commerce, and to that extent they are engaged in the business of carrying on interstate commerce and are entitled to the protection of the Federal Constitution against laws burdening commerce of that character."

But it is pointed out that the fact that a corporation is not engaged directly in commerce is an important factor in determining the effect of the tax.

Referring to Western Union Telegraph Company *v.* Kansas and Pullman Co. *v.* Kansas, it is said, at page 85:

"In the Kansas cases the business of both complaining companies was commerce, the same instrumentalities and the same agencies carrying on in the same places the business of the companies of state and interstate character. In the Western

Union Telegraph Company Case, the company had a large amount of property permanently located within the State and between 800 and 900 offices constantly carrying on both state and interstate business. The Pullman Company had been running a large number of cars within the State, in state and interstate business, for many years. There was no attempt to separate the intrastate business from the interstate business by the limitations of state lines in its prosecution."

While there is clearly no attempt to confine the Kansas cases merely to transportation and telegraph companies, it is obvious that where the business of a corporation is directly commerce itself and that commerce is carried on throughout a state as a part of the entire business of the corporation by the same instrumentalities and entirely without reference to state lines, it is much easier to find that a tax on the privilege of doing business within the state necessarily burdens the entire business of the corporation.

This is but the same attitude which the Supreme Judicial Court of Massachusetts has consistently adopted in dealing with these cases. In Attorney-General *v.* Electric Storage Battery Co., 188 Mass. 239, the first case which arose under this system of taxation, it held the tax applicable only to the privilege of engaging in a local business and in the injunction authorized expressly excepted "the business of disposing of its goods as a part of interstate commerce" (p. 242).

In Baltic Mining Company *v.* Commonwealth, 207 Mass. 381, S. S. White Dental Manufacturing Company *v.* Commonwealth, 212 Mass. 35, and Keystone Watch Case Company *v.* Commonwealth, 212 Mass. 50, it was in no way suggested that the companies in-

volved were not in part engaged in interstate commerce. It was made plain, however, that there is a very substantial difference in the effect of a tax upon the privilege of doing local business in the case of such companies from the effect of a similar tax upon a corporation directly engaged solely in commerce, like those involved in the Kansas cases.

In the Pocahontas Fuel Company case, decided at the same time as the cases at bar (Rec., p. 36, 218 Mass. 558, 568) it was distinctly held that a corporation maintaining an office in the state solely for the sale of goods for interstate delivery was not subject to the tax.

There has thus been no change or inconsistency in the attitude of that court. It has from the first recognized that the sale of goods for interstate delivery was entitled to protection under the commerce clause. It has differentiated between corporations engaged directly in interstate commerce through the transportation of goods and those indirectly so engaged through sales for interstate delivery only in determining whether a particular tax burdened interstate commerce or not. In its recognition that a tax on a transportation company might have a very different effect from one upon a mercantile company it has the full support of this court in Baltic Mining Company *v.* Commonwealth.

The foregoing discussion makes it plain that the only test laid down by this court in the Baltic Mining Company case is that a tax of the character now under consideration can only be invalidated when its necessary effect is to burden interstate commerce or to tax property beyond the jurisdiction of the court.

"If the tax purports to be laid upon a subject within the taxing power of the State, it is not to be condemned by the appli-

cation of any artificial rule but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction."

> Kansas City Railway *v.* Kansas, 240 U. S. 227, 233.

This test is a matter of substantial effect and does not depend in any way upon the phraseology used to state it. In applying it various forms of expression may be used.

In the Baltic Mining Company case it is said, referring to the businesses of the corporations before the court, "that local and domestic business, for the privilege of doing which the State has imposed a tax, is real and substantial and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business of the companies involved" (p. 86). This is merely saying that each of these corporations is conducting a local business substantial in character and not an incident of interstate commerce and so separable from their interstate transactions that a tax upon the local business does not necessarily burden interstate commerce. There is no suggestion that the local business shall bear any particular ratio to the total business. It must merely be a reality so that a tax upon these transactions does not become a subterfuge. (See original brief, p. 17.)

The Massachusetts court has from time to time employed varying language in stating this test. In Baltic Mining Company *v.* Commonwealth, 207 Mass. 381, 390, it held that the tax is inapplicable to a corporation engaged in interstate commerce which "should be engaged in intrastate business so closely connected with

the interstate commerce that it could not be given up without serious detriment to the interstate commerce." In S. S. White Dental Manufacturing Company *v.* Commonwealth, 212 Mass. 35, 44, in upholding a tax upon the petitioner, the court said:

"It seems plain from the agreed facts that there is in a legal sense no inextricable connection between the interstate and the intrastate business of the petitioner. They are not so interwoven that they cannot be separated reasonably."

In the cases at bar the court said (Rec., p. 35, 218 Mass. 558, 566):

"The test is whether the foreign corporation transacts domestic business substantial in its essence and not by comparison, and reasonably susceptible of separation from its interstate commerce. If it does, the state can fix its own terms so far as license fee is concerned."

The foregoing are plainly intended merely as restatements in different language of the broad test laid down by this court in the Baltic Mining Company case.

Later in its opinion (Rec., p. 40) the court stated the test in a somewhat different fashion:

"The distinction is not whether a profit is made by the conjoining and a loss suffered by separating the intrastate and the interstate commerce, but whether the nature of the business is such that the company is free to renounce the domestic business if it chooses and still conduct its interstate commerce."

This latter statement is but a paraphrase of the following language used by this court in Pullman Company *v.* Adams, 189 U. S. 420, 422:

"The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce."

See also similar expressions in Allen *v.* Pullman Palace Car Co., 191 U. S. 171, 182; Kehrer *v.* Stewart, 197 U. S. 60, 67.

In the S. S. White Dental Manufacturing Company case it was also contended that the tax in question denied to that company equal protection of the laws within the principles discussed in Southern Ry. Co. *v.* Greene, 216 U. S. 400. This contention was based on the ground that the tax of this company was increased after it had acquired an alleged permanent property in the state. The only property owned by it which could by any possibility be contended to be of such a nature was its leasehold interest in its offices and storerooms. The court stated (p. 88) "we do not find in this situation an acquisition of permanent property, such as was shown in the Greene case." The court also said (p. 88):

"Even if, as plaintiffs in error contend, under the statute, domestic corporations are favored, the statute is not invalid, for no limitation upon the power of a State to exclude foreign corporations requires identical taxes in all cases upon domestic and foreign corporations."

III.

Test of Baltic Mining Company Case Applied.

The only questions under the commerce clause now open to the petitioners grow out of the application of the test laid down in the Baltic Mining Company case to the facts of each case now before the court. These facts were fully analyzed in the original brief for the

Commonwealth and what was there stated need not now be repeated. It will, however, perhaps be helpful to compare these facts more directly with the facts in the Baltic Mining Company and the S. S. White Company cases than was previously attempted.

Cheney Brothers Company. (Rec., p. 11.)

The facts in this case differ substantially from those in the S. S. White Company case only in two respects: first, this company maintains no stock of goods in Massachusetts from which deliveries are made but only a stock of samples, all goods sold being shipped from Connecticut; second, its home establishment from which all goods sold are shipped is located in Connecticut, one of the states covered by the salesmen of the Boston office.

This first difference, though it produces the result that all sales made at the Boston office other than to Connecticut customers, are consummated by interstate shipment, does not deprive that office of its local character. The privilege of maintaining a salesroom is none the less local merely because, by reason of the nature of the business, sales are there made by a display of a stock of samples rather than by delivery from a stock of goods kept in bulk. Privileges of both character are of equal value to a corporation engaged in the sale of merchandise. The narrow distinction between sale by sample and from bulk ought not to limit the power of a state to tax the privilege of engaging in business within its borders.

However, even if the line of demarcation is ever to be drawn thus narrowly in the ordinary case, it cannot be so drawn here.

The second difference between this case and that of the S. S. White Company above stated plainly establishes the right of the Commonwealth to impose the excise in question. As the Massachusetts court finds from the agreed facts, this corporation was using its Boston office as an agency for the selling of its goods to Connecticut customers. The salesmen employed by that office covered Connecticut with the rest of New England and sold goods to Connecticut residents which were delivered by shipment from the home office in Connecticut. Similarly sales were made at the Boston office to any Connecticut customer who resorted there which were delivered without crossing the state lines. Such transactions in no way involved interstate commerce. The Boston office is merely in such cases an instrumentality of the domestic Connecticut business of this company. It is a real agency, however, for these Connecticut sales all appear to be made by the employees of the Boston office and in precisely the same way as they make all other New England sales of the company. It is not a mere case of recording orders in Boston, as the petitioner contends, for it appears to be the Boston office that actually does all the work of making these Connecticut sales. This phase of the business of the petitioner alone justified the conclusion that this corporation was conducting business in Massachusetts separate and distinct from interstate commerce and was thus subject to the imposition of a tax.

That the Massachusetts court was warranted in making the inferences of fact set forth as to the Connecticut business of this corporation and that this court is bound by those inferences is demonstrated by the original brief of the Commonwealth (pp. 20, 49).

Lanston Monotype Machine Company. (Rec., p. 12.)

This company maintains an office in Boston at which it is carrying on the purely domestic business of selling from a local stock parts of its machines to replace or repair broken parts. That this local business is separable from the interstate business of selling typesetting machines for delivery from its Philadelphia manufactory is plainly shown by the fact that its competitors maintain no such local stock. The only possible difference between this case and that of the S. S. White Dental Manufacturing Company is the extent of the local business. In the White Company case the amount of sales from the local stock does not appear, but the entire sales for delivery in Massachusetts are about five per cent. total sales of the company (231 U. S. 81), and apparently the sales from the local stock for such delivery are less than half of that amount (p. 80). The total amount of sales from the local stock in the present case is said to be about $12,000 annually and the profit thereon about twenty per cent. of that amount.

It is obvious, however, that the value of the privilege of maintaining this local stock and business is far greater than the profit thereby made. The petitioner's competitors maintain no such local stock, and it is agreed (Rec., p. 12) that by this means it obtains a decided advantage over them in selling its machines. The extent of this advantage does not appear, but there is nothing in the record to show that the value of the privilege of conducting this local business, when thus broadly considered, is at all disproportionate to the amount of the tax paid. The

privilege is a real one of substantial value to the petitioner. The right of the state in administering a legitimate system of taxation to impose an excise upon the use of that privilege cannot depend upon the extent of that use. The tax in question is a tax on the privilege, not on the profits made by its use. It is a license tax, not an income tax.

Locomobile Company of America. (Rec., p. 13.)

As pointed out in the original brief of the Commonwealth (p. 26), this petitioner has not established on the facts in this case that its sales of new cars in Massachusetts constitute interstate commerce. As the Massachusetts court declares (Rec., p. 41), apparently the sales of new cars are made without apportionment of any particular automobile to a customer until the cars reach Boston and are separated by the Boston agent. Thus the petitioner has not established that even these sales are not intrastate sales from a local stock.

If we assume, however, that the sales of new cars constitute interstate commerce, there is no substantial difference between this case and that of the S. S. White Company. Its plainly local business of selling used cars amounted to $41,000 in the year in question, which was one-sixth of the total business of the Boston office. Its local repair department did business amounting to $7,500 and carried a stock of repair parts for sale or use in its repair business amounting to $6,000. Neither the profits of these local departments nor their relation to the total profits of the petitioner is disclosed by the record. Obviously the former are many times greater than the $1,000 tax imposed upon the petitioner.

Furthermore, as in the preceding case, the value of the privilege of conducting these departments in their effect upon the sales of new cars is much greater than the mere immediate profit indicates. Thus it must be held that these two local departments maintained by this company are entirely separable from any interstate business conducted by the petitioner and that the business conducted therein is real and substantial, not only in essence but also in comparison with the remaining business of the company.

Northwestern Consolidated Milling Company. (Rec., p. 16.)

Nowhere in the voluminous brief of the petitioner do we find any attempt to dispute the conclusion of the Massachusetts court that the chief business of this corporation in Massachusetts is to furnish salesmen to act as agents for local wholesale dealers in selling to local retail dealers. (Rec., p. 42; original brief, p. 28.) This phase of the case need not be here restated. Assuming it to be true, as apparently the petitioner is forced to do, the business of this corporation in Massachusetts is almost entirely local and obviously taxable.

The wholesale dealers buy their stock of grain from which the orders obtained from the petitioner for their benefit are filled. The contention that these sales are not interstate commerce need not be repeated here. (Original brief, p. 29.)

This corporation also makes sales (whether to wholesalers or to retailers does not appear) from a local stock to the extent of about one per cent. of its Massachusetts sales. Its total Massachusetts sales are about $4,500,000. This local business of $45,000, at least in the

absence of any evidence of the profit derived, cannot be said to be other than real or substantial. It is obviously separable from the main business of furnishing agents to local wholesale dealers. The tax of $450 paid is but one per cent. of the total amount of sales from this local stock alone. Even if this were the only local privilege exercised, it could not be held that such a tax was other than a reasonable burden on that local business alone.

Copper Range Company. (Rec., p. 17.)

This corporation is a holding company. It owns about fifty per cent. of the stock of the Champion Copper Company, one of the other petitioners in these cases, stock and bonds of a Michigan railroad and certain mineral lands in Michigan. Apparently its only business is to receive the income of its holdings, to pay the salaries of its officers and other expenses and to disburse the balance to its stockholders. These transactions all take place in Massachusetts. Its corporate records, its financial books of account, and, apparently, its securities are kept in that State. Its directors' meetings and even its stockholders' meetings are held there. So far as appears this corporation does nothing outside of that State except to hold the title of certain real estate in Michigan.

There can be no question but that this petitioner is doing business in Massachusetts of such a character and to such an extent that it is subject to the jurisdiction of the courts of the Commonwealth and amenable to the service of process therein. The rule applicable in such cases has been broadly stated by this court as follows:

"In a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served and in which it is bound to appear when a proper agent has been served with process."

St. Louis Southwestern Ry. Co. *v.* Alexander, 227 U. S. 218, 227.

See also: —

International Harvester Co. *v.* Kentucky, 234 U. S. 579.

Washington-Virginia Ry. Co. *v.* Real Estate Trust Co., 238 U. S. 185.

Philadelphia & Reading Ry. Co. *v.* McKibben, 243 U. S. 264.

This corporation conducts substantially all its activities in Massachusetts. Its officers are resident in that State and there perform all their official duties. A corporation of this character could not go further in submitting itself to the jurisdiction of a State other than that of its domicil.

As this petitioner is thus present in Massachusetts in a jurisdictional sense, it becomes merely a question of the interpretation of the Massachusetts statute whether it is doing business in that State within its meaning and is thus subject to a tax under its terms. As is pointed out in the original brief of the Commonwealth (p. 31) that is purely a matter of local law concerning which the decision of the State court is final.

Accordingly, as this company concedes that it is not engaged in interstate commerce (Plaintiff's brief, p. 79),

it necessarily follows that it is subject to the tax in question on account of the privileges exercised by it in Massachusetts.

Champion Copper Company. (Rec., p. 19.)

The facts in this case are almost identical with those in the Baltic Mining Company case. Both corporations operate mines in Michigan and sell their products exclusively through the agency of the United Metals Selling Company, such sales in both instances being consummated by interstate delivery. Both maintain offices in Boston for the use of their officers, for meetings of their directors and for the general financial management of their affairs. Both companies receive at Boston and there deposit the proceeds of their sales and there pay their expenses and disburse their dividends. More detail appears in the record in the case of this petitioner, but apparently both companies supervise and direct the work of their selling agent through their Boston offices. Neither company engages in any further activities in Massachusetts.

The only possible difference between the companies is that in the case of the petitioner the directors "have delegated to the general manager of the company, resident in Michigan, the exclusive management and control of the mining operations in Michigan and the mining property there located." (Rec., p. 22.) But it is stated, "under the by-laws, the board of directors have, by law, the general management and control of all the business and property of the company." (Rec., p. 22). Obviously they have not deprived and cannot, by the appointment of a manager of the Michigan mine and

property, deprive themselves of the duties thus imposed upon them by the laws of Michigan and their own by-laws. As directors they must control through their agents all the activities of the corporation, and that control they exercise in Massachusetts. They may, of course, delegate to an agent in Michigan the duty of supervising all details of the operation of the mine, but they have at any time the right to modify or control his authority. He must act only subject to their supervision.

No distinction of substance can be pointed out between this case and that of the Baltic Mining Company. The decision in that case in its application to the facts there involved necessarily requires an affirmation of the decree of the Massachusetts court in the case of this petitioner.

White Company. (Rec., p. 18.)

This petitioner concedes that it is engaged in transactions in Massachusetts entirely separable from interstate commerce, and that the commerce clause does not in any way operate to free it from taxation in that State. Its sole claim is that in imposing upon it the tax in question the Commonwealth denied to it the equal protection of its laws under the rule laid down by this court in Southern Ry. Co. *v.* Greene, 216 U. S. 400, on the ground that the rate of its tax was increased after it had acquired a permanent property in the State and that this resulted in an unconstitutional discrimination against it in favor of domestic corporations. (Rec., p. 19.)

In the original brief for the Commonwealth (p. 35)

these contentions are fully answered. It is shown that this company has acquired no permanent property in Massachusetts within the meaning of the Greene case, and it is further demonstrated that the laws of Massachusetts do not in any manner discriminate against it in favor of domestic corporations in the matter of taxation. It accordingly follows that this petitioner does not bring itself within the scope of Southern Ry. Co. *v.* Greene.

It need only be added that it still remains true, as stated in the original brief (p. 38) that "no case can be pointed out where this court has applied the rule which this petitioner invokes to corporations other than railroad companies. If it can ever be otherwise applied, it can only be done in the case of some corporation devoted to some unusual monopolistic business whose property could by no possibility be devoted to other business purposes or be sold to individuals engaged in a similar business."

IV.

Conclusion.

Accordingly, the defendant in error contends that in all the cases covered by this record, except that of the Copper Range Company, the decision of this court in Baltic Mining Company *v.* Commonwealth requires that the decrees of the Supreme Judicial Court of Massachusetts dismissing these petitions be affirmed. In the case of the Copper Range Company the defendant in error contends that, it being conceded that the petitioner is not engaged in interstate commerce and it appearing that it is engaged in business in

Massachusetts, within the meaning of the Massachusetts statute as interpreted by its highest court, the writ of error should be dismissed as disclosing no federal question.

Respectfully submitted,

HENRY C. ATTWILL,
Attorney-General for the Commonwealth of Massachusetts.

WM. HAROLD HITCHCOCK,
Assistant Attorney-General.

Office Supreme Court, U. S.
FILED
OCT 9 1916
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 55

P. J. HAMILL, Plaintiff in Error,

vs.

THE JOSEPH SCHLITZ BREWING COMPANY.

MOTION TO PASS CAUSE

BENJAMIN I. SALINGER,
FREDERICK S. TYLER,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 55

P. J. HAMILL, Plaintiff in Error,

vs.

THE JOSEPH SCHLITZ BREWING COMPANY.

To The Joseph Schlitz Brewing Company, Milwaukee, Wisconsin:

You will please take notice that the undersigned will submit to the Supreme Court of the United States, at a session of said court to be held in the city of Washington, District of Columbia, on Monday, October 9, 1916, at the opening of Court on that day, or as soon thereafter as is possible, the accompanying Motion to pass this cause.

BENJAMIN I. SALINGER,
FREDERICK S. TYLER,
Attorneys for Plaintiff in Error

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1916.

No. 55.

P. J. HAMILL, Plaintiff in Error,

vs.

THE JOSEPH SCHLITZ BREWING COMPANY.

MOTION OF PLAINTIFF IN ERROR TO PASS THIS CAUSE.

Comes now this plaintiff in error in the above entitled and numbered cause, by his counsel, and moves this honorable court to pass the said cause until after a certain cause entitled Martin H. Free, Plaintiff in Error, vs. Western Union Telegraph Company, shall have been decided by this court.

The undersigned respectfully aver that the Writ of Error in said case of Hamill vs. Schlitz Brewing Company is meritorious and perfected in good faith; that one point therein made is that judgment obtained by P. J. Hamill vs. The Joseph Schlitz Brewing Company in the District Court of Iowa for Greene County is valid and subsisting, and should be enforced, and that there is no defense to its enforcement and collection except a claim that said judgment has been reversed by the Supreme Court of Iowa, and that the said pretended reversal is void because

the Supreme Court of Iowa had no jurisdiction to reverse said judgment.

The same point is presented in the said cause of Free vs. The Western Union Telegraph Company, which will be submitted to this court some time during October, 1916.

If said point made in the Free case be sustained it will be unnecessary to proceed further with the case of Hamill vs. The Joseph Schlitz Brewing Company.

Poverty has made it impossible, up to now, to raise the money for the deposit required in Hamill vs. Schlitz Brewing Company, which is $420.00 It is reasonable to believe, and we aver, that if for any reason it should be deemed advisable to proceed after a decision in Free vs. The Western Union Telegraph Company, that the money for such deposit will be raised.

No appearance has been made in the Supreme Court of the United States for and on behalf of the defendant in error, the Joseph Schlitz Brewing Company.

BENJAMIN I. SALINGER,
FREDERICK S. TYLER,
Attorneys for Plaintiff in Error.

AFFIDAVIT.

State of Iowa, Carroll County, ss.

Benjamin I. Salinger, being first duly sworn, according to law, deposes and says that he is one of the counsel of record for the Plaintiff in Error in the said case of P. J. Hamill vs. Joseph Schlitz Brewing Company; that

he is familiar with the record in said cause; that he is the counsel who prepared the Brief and Argument in the said case of Free vs. The Western Union Telegraph Company, and is familiar with the record in that cause. That he believes the point made in said Free case, attacking the jurisdiction of the Supreme Court of Iowa, will be sustained by the Supreme Court of the United States and that if this be done it will prove unnecessary to proceed further with said cause of Hamill vs. Schlitz.

Affiant says further that he has read the Motion herein and foregoing, and that the statements therein made are true as he verily believes.

And further this deponent saith not save that he has read the foregoing affidavit, and that its statements are true as he verily believes.

(Signed) BENJAMIN I. SALINGER.

Subscribed and sworn to before me this 7th day of October, A. D. 1916.

(Seal of the Notary.)

LOUIS H. SALINGER,

Notary Public for Carroll County, State of Iowa.

My commission expires July 4, A. D. 1918.

Office Supreme Court, U. S.
FILED
OCT 30 1916
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

THE KEETOOWAH SOCIETY,
A Corporation, et al.,
Appellants,
vs.
FRANKLIN K. LANE,
Secretary of the Interior,
Appellee.

No. 62, O. T. 15

MOTION TO PASS

The Appellants respectfully move the Court to pass this case for hearing until a later date, for the following reason:

They are Cherokee Indians residing in the State of Oklahoma.

At the time of the institution of this suit the organization of Cherokees in Oklahoma as an Indian Tribe was recognized by the Government of the United States.

Since the allowance of this appeal the appellee, the Secretary of the Interior, has officially declared the tribal organization abolished.

Changes in tribal conditions have greatly increased the difficulty in making the provisions for meeting the costs and other necessary expenses incident to this suit; and Congressional legislation is now pending whereby appellants seek relief in the premises.

Respectfully submitted,

C. C. CALHOUN,
DANIEL B. HENDERSON,
Attorneys for Appellants.

The Government offers no objections to this motion.